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TRANSCRIPT OF RECORD

795431
Sup. Ct

Supreme Court of the United States

OCTOBER TERM, 1947

No. 54

HARRY BLUMENTHAL, PETITIONER,

vs.

THE UNITED STATES OF AMERICA

No. 55

LAWRENCE B. GOLDSMITH, PETITIONER,

vs.

THE UNITED STATES OF AMERICA

No. 56

SAMUEL S. WEISS, PETITIONER,

vs.

THE UNITED STATES OF AMERICA

No. 57

ALBERT FEIGENBAUM, PETITIONER,

vs.

THE UNITED STATES OF AMERICA

ON WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT
OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR CERTIORARI FILED MARCH 26, 1947.

CERTIORARI GRANTED MAY 5, 1947.

No. 11232

United States
Circuit Court of Appeals

For the Ninth Circuit.

HARRY BLUMENTHAL, LOUIS ABEL,
LAWRENCE B. GOLDSMITH, SAMUEL
S. WEISS and ALBERT FEIGENBAUM,
Appellants,

vs.

UNITED STATES OF AMERICA,
Appellee.

Transcript of Record

Upon Appeals from the District Court of the United States
for the Northern District of California,
Southern Division

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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Attorney for Plaintiff and Appellee.

In the Southern Division of the United States District Court for the Northern District of California.

No. 29238-G

(Title 18 U. S. C. Section 88)

INDICTMENT

In the November, 1944, term of said Division of said District Court, the Grand Jurors on their oaths present: That Harry Blumenthal, Louis Abel, Lawrence B. Goldsmith, Samuel S. Weiss, and Albert Feigenbaum, (hereinafter called "said defendants") at a time and place to said Grand Jurors unknown, did knowingly, wilfully, unlawfully, corruptly, and feloniously conspire, combine, confederate, arrange, and agree together and with divers other persons, whose names are to the Grand Jurors unknown, to commit offenses against the United States of America and the laws thereof, the offenses being to knowingly, wilfully and unlawfully sell at wholesale certain distilled spirits, to-wit, Old Mr. Boston Rocking Chair Whiskey, in excess of and higher than the maximum price established by law, said maximum price at wholesale then and there being not in excess of \$25.27 per case of twelve bottles, each of said twelve bottles containing one-fifth of one gallon of said Old Mr. Boston Rocking Chair Whiskey, in violation of Sections 902 (a), 904 (a), and 925 (b) of Title 50 U.S.C.A. App., and Office of Price Administration Regulations: Maximum Price [1*] Regulation 193 and Maximum Price Regulation 445.

*Page numbering appearing at foot of page of original certified Transcript.

And the said Grand Jurors, upon their oaths aforesaid, do further charge and present: That in pursuance of, and in furtherance of, in execution of, and for the purpose of carrying out, and to effect the object and design and purposes of said conspiracy, combination, confederation, and agreement aforesaid, the hereinafter named defendants did, at the times hereinafter set forth, commit the following overt acts within the Southern Division of the Northern District of California and within the jurisdiction of this Court:

(1) That on or about the 9th day of December, 1943, at the City and County of San Francisco, State of California, said defendant Harry Blumenthal sold to one Herman Fingerhut 100 cases of Old Mr. Boston Rocking Chair Whiskey;

(2) That on or about the 9th day of December, 1943, at the City and County of San Francisco, State of California, the said defendant Harry Blumenthal sold to one Walter Travis 100 cases of Old Mr. Boston Rocking Chair Whiskey;

(3) That on or about the 10th day of December, 1943, at the City and County of San Francisco, State of California, said defendant Albert Feigenbaum accepted from one H. L. Taylor and one R. C. Humes a check payable to the Francisco Distributing Company in the sum of \$4,900.00;

(4) That on or about the 16th day of December, 1943, at the City and County of San Francisco, State of California, said defendant Harry Blumen-

thal accepted from one James Cernusco a check payable to the order of Francisco Distributing Company in the amount of \$2,000.00;

(5) That on or about the 20th day of December, 1943, at the City and County of San Francisco, State of California, said defendant Samuel S. Weiss did give instructions to one Jeremiah D. Higgins and others relating to the unloading of one freight car, Penn. R. R. Number 568500, which said freight car contained 2,076 cases [2] of Old Mr. Boston Rocking Chair Whiskey;

(6) That on or about the 23rd day of December, 1943, at the City and County of San Francisco, State of California, said defendant Albert Feigenbaum transferred to one H. L. Taylor a check in the amount of \$2,450.00;

(7) That on or about the 23rd day of December, 1943, at the City and County of San Francisco, State of California, the said defendants Samuel S. Weiss and Lawrence B. Goldsmith did ship and cause to be shipped, 100 cases of Old Mr. Boston Rocking Chair Whiskey to H. L. Taylor and R. C. Humes;

(8) That on or about the 23rd day of December, 1943, at the City and County of San Francisco, State of California, said defendant Samuel S. Weiss sold to one Victor Figone 200 cases of Old Mr. Boston Rocking Chair Whiskey;

(9) That on or about the 10th day of January, 1944, at the City and County of San Francisco, State

of California, the said defendants Lawrence B. Goldsmith and Samuel S. Weiss completed and delivered to one John Giometti Invoice Number 10171 of the Francisco Distributing Company;

(10) That on or about the 5th day of January, 1944, at the City and County of San Francisco, State of California, said defendants Samuel S. Weiss and Lawrence B. Goldsmith shipped 25 cases of Old Mr. Boston Rocking Chair Whiskey to Herman Fingerhut at Vallejo, California.

(Signed) FRANK J. HENNESSY

United States Attorney.

[Endorsed]: A true bill, D. Bosschart, Foreman. Presented in Open Court and Ordered Filed Feb. 21, 1945. C. W. Calbreath, Clerk. By J. P. Welsh, Deputy Clerk. [3]

District Court of the United States, Northern District of California, Southern Division.

At a Stated Term of the Southern Division of the United States District Court for the Northern District of California, held at the Court Room thereof, in the City and County of San Francisco, on Wednesday, the 28th day of February, in the year of our Lord one thousand nine hundred and forty-five.

Present: The Honorable A. F. St. Sure,
District Judge.

No. 29238

UNITED STATES OF AMERICA,

vs.

HARRY BLUMENTHAL, et al.

**ARRAIGNMENT—BLUMENTHAL, GOLD-
SMITH AND FEIGENBAUM**

This case came on regularly this day for arraignment. The defendants were present in proper person and with their respective attorneys; viz: Morris Oppenheim, Esq., for defendant Harry Blumenthal; Walter Duane, Esq., and Arthur Dunne, Esq., for defendant Lawrence B. Goldsmith; and Leo Friedman, Esq., for defendant Albert Feigenbaum. Reynold H. Colvin, Esq., Assistant United States Attorney, was present on behalf of the United States.

On motion of Mr. Colvin, the defendants were called for arraignment. The defendants were informed of the return of the Indictment by the United States Grand Jury, and asked if they were the persons, among others, named therein, and upon their answer that they were, and that their true names were as charged, said defendants were informed of the charges against them and stated that they understood the same. [4] Counsel for defendants waived the reading of the Indictment.

After hearing the attorneys, it is ordered that this case be continued to March 12, 1945, at 11 a. m., to plead.

District Court of the United States, Northern District of California, Southern Division:

At a Stated Term of the Southern Division of the United States District Court for the Northern District of California, held at the Court Room thereof, in the City and County of San Francisco, on Friday, the 2nd day of March, in the year of our Lord one thousand nine hundred and forty-five.

Present: The Honorable A. F. St. Sure,
District Judge.

No. 29238

UNITED STATES OF AMERICA,

vs.

LEWIS ABEL and SAMUEL S. WEISS

ARRAIGNMENT—ABEL AND WEISS

This case came on regularly this day for arraignment. The defendants were present with their respective attorneys: J. V. Lewis, Esq., for defendant Samuel S. Weiss; and Harry Wolff, Esq., for defendant Lewis Abel. James T. Davis, Esq., Assistant United States Attorney, was present on behalf of the United States.

The defendants were called for arraignment. Defendants were informed of the return of the Indictment by the United States Grand Jury, and asked if they were the persons named therein, and upon their answer that they were, and defendant Abel stating that his true name is Lewis (not

Louis); said defendants were informed of the charges against them and stated that they understood the same.

After hearing the attorneys, it is ordered that this case be continued to March 12, 1944, at 11 a. m., to plead. [6]

[Title of Court and Cause.]

DEMURRER

Comes now defendant Lewis Abel, charged in the indictment as Louis Abel, and demurs to said indictment on the following grounds:

I.

That said indictment does not state a public offense against said defendant.

II.

That said indictment is indefinite, uncertain and ambiguous in that this defendant is not advised of the charges he is called upon to meet on said indictment.

Whereas, defendant Lewis Abel, charged in said indictment as Louis Abel, prays that the indictment herein be quashed, and that he be discharged and allowed to go hence without day.

HARRY K. WOLFF

Attorney for Lewis Abel, charged in the indictment as Louis Abel.

CERTIFICATE

I, Harry K. Wolff, attorney for the ~~forenamed~~ defendant, do hereby certify that the foregoing Demurrer is filed in good faith and not for the purpose of delay, and in my opinion is well taken in law.

Dated: March 10th, 1945.

HARRY K. WOLFF

Attorney for Lewis Abel (charged in the indictment as Louis Abel)

(Here follows "Points and Authorities in Support of Foregoing Demurrer.")

(Acknowledgment of receipt of copy.)

[Endorsed]: Filed Mar. 10, 1945. [7]

District Court of the United States, Northern District of California, Southern Division.

At a Stated Term of the Southern Division of the United States District Court for the Northern District of California, held at the Court Room thereof, in the City and County of San Francisco, on Monday, the 12th day of March, in the year of our Lord one thousand nine hundred and forty-five.

Present: The Honorable A. F. St. Sure,
District Judge.

No. 29238

UNITED STATES OF AMERICA,

vs.

**LAWRENCE B. GOLDSMITH and ALBERT
FEIGENBAUM.**

**DEFENDANTS GOLDSMITH AND FEIGEN-
BAUM EACH PLEADED "NOT GUILTY"
TO INDICTMENT.**

This case came on regularly this day for entry of plea. The defendants Lawrence B. Goldsmith and Albert Feigenbaum were present in proper person and with their attorneys, Leo Friedman, Esq., and Arthur Dunne, Esq. Reynold H. Colvin, Esq., Assistant United States Attorney, was present on behalf of the United States.

The defendants were called to plead and thereupon each defendant pleaded "Not Guilty" to the Indictment filed herein against him, which said pleas were ordered entered.

After hearing the attorneys, it is ordered that this case be continued to May 8, 1945, for trial (Jury) [8]

[Title of Court and Cause.]

**DEMURRER TO INDICTMENT OF DEFEND-
ANT HARRY BLUMENTHAL**

Now comes Harry Blumenthal, one of the Defendants named in the indictment presented and

filed in the cause entitled and numbered as above, and demurs to the indictment aforesaid, and says that the matters and things in said indictment alleged and appearing are insufficient in law to require this defendant to answer or plead thereto, for each of the following reasons, to-wit:

I.

That the said indictment does not charge this defendant with any crime or offense against the United States of America.

II.

That the said indictment does not state facts sufficient to charge this defendant with having conspired to commit any crime or offense against the United States of America, for all and singular the reasons which in the Memorandum of Points and Authorities in support of this demurrer which are hereunto [9] annexed and made a part hereof fully and at large appear.

III.

That the said indictment is bad for uncertainty in each of the following particulars, to-wit:

(1) It is alleged in the said indictment that the defendants unlawfully conspired and confederated to commit offenses against the United States and the laws thereof, the offenses being to knowingly, wilfully and unlawfully sell at wholesale certain distilled spirits, to-wit, Old Mr. Boston Rocking Chair Whiskey, in excess of and higher than the maximum price established by law, said

maximum price at wholesale then and there being not in excess of \$25.27 per case of twelve bottles, but it is not alleged in said indictment and cannot be ascertained therefrom how or in ~~what~~ manner or by virtue of what provision of law such sale was or would or could have been a violation of any law, or was, ~~or~~ could have been a violation of any penal statute, or was or could have been an offense against the United States.

(2) That it is not alleged in said indictment and cannot be ascertained therefrom how or in what manner the act or acts which said indictment alleges that the defendants therein named conspired to do were or could have been a violation of Sections 902 (a), 904 (a), and 925 (b) of Title 50 U. S. C. A., or of any provision of any of said sections.

(3) That it is not alleged in said indictment and cannot be ascertained therefrom how or in what manner any act or acts which said indictment alleges as aforesaid that the said defendants conspired to do was in violation of maximum price regulation 193, or maximum price regulation 445, neither can it be ascertained therefrom what provision of either of said regulations fixed or established at the time of the formation of said alleged conspiracy, or at any other time, any maximum price for the sale [10] of said whiskey at wholesale, or whether any regulation of the Price Administrator of the United States fixed any maximum price for the sale at wholesale of said whiskey, nor can it be ascertained from said indictment how or in what manner or by virtue of what provision of any price regulation

said maximum price of said whiskey at wholesale as alleged in said indictment is computed or ascertained or arrived at; nor can it be ascertained from an examination or reading of either of said price regulations that any maximum wholesale price for said whiskey has ever been fixed or determined by the Price Administrator.

(4) That it can not be ascertained from said Indictment when or where the said alleged conspiracy was entered into, by reason whereof it is impossible to ascertain or determine from said Indictment whether or not the agreement which said Indictment alleges was entered into by the defendants had for its object the doing of any act or acts which were at the time contrary to any law of the United States.

(5) That it can not be ascertained from said Indictment whether the Emergency Price Control Act was in effect when the defendants named in said Indictment entered into the said alleged conspiracy or agreement.

(6) That it can not be ascertained therefrom whether Maximum Price Regulation 193 was in effect at the time that the defendants in said Indictment named are alleged to have arranged and agreed to sell the whiskey therein mentioned at the price mentioned therein.

(7) That it can not be ascertained from said Indictment whether Maximum Price Regulation 445 was in existence or effect at the time said defendants are alleged to have entered into said agreement or arrangement.

(8) That by reason of the aforesaid uncertainties in the said indictment, this defendant is unable to answer the same or [11] to prepare his defense thereto, or to plead an acquittal thereof as a bar to a subsequent prosecution because of the matters and things therein alleged.

IV.

That this honorable Court has no jurisdiction in this cause, for the reason that the Emergency Price Control Act of 1942, 50 U.S.C.A. Appendix, is void because it is repugnant to and in violation of the Constitution of the United States for the following reasons, among others, to-wit:

(a) That the said Act is an invalid and unconstitutional delegation of legislative powers which may be exercised by the Congress of the United States alone, to an administrative officer, to-wit: the Price Administrator;

(b) That the said Act is an invalid and unconstitutional delegation by Congress to the said Price Administrator of the judicial power of the United States which may be constitutionally exercised by the Courts of the United States alone;

(c) That the said Emergency Price Control Act violates and is repugnant to the provision of the Fifth Amendment to the Constitution of the United States that "No person . . . shall be . . . deprived of life, liberty or property without due process of law, nor shall private property be taken for public use without just compensation;

(d) That said Emergency Price Control Act

violates and is repugnant to the provision of the Tenth Amendment to the Constitution of the United States, that "The powers not delegated to the United States by the Constitution nor prohibited by it to the States, are reserved to the States respectively or to the People." [12]

* * * *

Wherefore, defendant Harry Blumenthal prays that this, his Demurrer to the said Indictment, be sustained, and that he go hence without day.

MORRIS OPPENHEIM

Attorney for Defendant Harry
Blumenthal.

(Here follows "Memorandum of Points and Authorities in Support of Demurrer to Indictment.")

[Endorsed]: Filed Mar. 12, 1945.

[Title of Court and Cause.]

MOTION OF DEFENDANT HARRY BLUMENTHAL TO QUASH INDICTMENT

To the Honorable Judges of the Southern Division
of the United States District Court for the
Northern District of California:

Now comes Harry Blumenthal, one of the defendants in the above entitled cause, and moves this Honorable Court that the indictment on file herein be quashed, set aside and held for naught for each of the following reasons, to-wit:

I.

That said indictment, as appears upon the face

thereof, is based upon section 88 of Title 18, U. S. C. A., and purports to be for the offense of conspiracy to commit offenses against the United States within the purview of the section entitled aforesaid, and that it further appears from the face of said indictment that the defendants therein named are charged therein with conspiring to violate the provisions of sections 904 (a) and 925 (b) of Title 50 U.S.C.A. Appendix and Office of Price Administration Regulations, Maximum Price Regulation 193 and Maximum Price Regulation 445, and that a conspiracy to violate section 904 (a) and section 925 (b) aforesaid or to violate either of the Maximum Price Regulations aforesaid is not punishable as a conspiracy under the provisions of section 88, Title 18, U.S.C.A.

II.

That a conspiracy to violate any maximum price regulation issued or adopted or imposed by the Price Administrator pursuant to the authority conferred upon the Price Administrator by section 902 (a) of Title 50 U.S.C.A. Appendix is punishable, if at all, solely under and by virtue of sections 904 (a) and 925 (b) of the Title last aforesaid, and is punishable solely as a misdemeanor. [14]

III.

That section 904 (a) of the said Emergency Price Control Act provides as follows:

“It shall be unlawful, regardless of any contract, agreement, lease or other obligation heretofore or hereafter entered into, for any person

to sell or deliver any commodity, or in the course of trade or business to buy or receive any commodity, or to demand or receive any rent for any defense-area housing accommodations, or otherwise to do or omit to do any act, in violation of any regulation or order under section 2 (section 902 of this Appendix), or of any price schedule effective in accordance with the provisions of section 206 (section 926 of this Appendix), or of any regulation, order, or requirement under section 202 (b) or section 205 (f) [sections 922(b) or 925 (f) of this Appendix], or to offer, solicit, attempt or agree to do any of the foregoing;"

that by reason of the aforesaid provision of said Emergency Price Control Act, a conspiracy to violate any regulation or price schedule such as is alleged in the said indictment is specifically punishable under the provisions of section 904 (a)."

IV.

That section 925 (b) of said Act provides:

"Any person who wilfully violates any provision of section 4 of this Act [section 904 of this Appendix] and any person who makes any statement or entry false in any material respect in any document or report required to be kept or filed under section 2 or section 202 [sections 902 or 922 of this Appendix], shall, upon conviction thereof, be subject to a fine of not more than five thousand dollars, or to imprisonment for not more than two years in

the case of a violation of section 4 (c) [section 904 (c) of this Appendix], and for not more than one year in all other cases, or to both such fine and imprisonment;”

and that by reason of the section last aforesaid a person conspiring to violate a maximum price regulation is guilty of a misdemeanor only, whereas under the provisions of ~~the~~ general conspiracy statute, 18 U.S.C.A., section 88, upon which this Indictment is based, one convicted thereof is guilty of a felony and subject to imprisonment for a maximum period of two years.

V.

That by reason of the premises, this defendant is not subject to prosecution under the provisions of section 18 U.S.C.A., [15] section 88, but only under the provisions of U.S.C.A. Title 50, section 925 (b):

Wherefore, said defendant prays that this Motion be granted, and that he go hence without day.

Dated this 12th day of March 1945.

MORRIS OPPENHEIM

Attorney for Defendant Harry
Blumenthal.

(Here follows “Points and Authorities in Support of Motion to Quash”, and “Notice of Motion to Quash Indictment”,) and

(Acknowledgment of receipt of service.)

[Endorsed]: Filed Mar. 12, 1945. [16]

District Court of the United States Northern
District of California, Southern Division

At a Stated Term of the Southern Division of the United States District Court for the Northern District of California, held at the Court Room thereof, in the City and County of San Francisco, on Thursday, the 29th day of March, in the year of our Lord one thousand nine hundred and forty-five.

Present: The Honorable Michael J. Roche, District Judge, sitting for and on behalf of Honorable A. F. St. Sure, District Judge.

No. 29238.

UNITED STATES OF AMERICA,

vs.

HARRY BLUMENTHAL, et al.

Order Continuing Case to April 2, 1945 for Hearing on Demurrers to Indictment and for Entry of Pleas.

This case came on regularly this day for hearing on demurrers to indictment and for entry of pleas of defendants, whereupon on motion of Reynolds H. Colvin, Esq., Assistant United States Attorney, it is ordered that said matter be continued to April 2, 1945. [17]

District Court of the United States, Northern District of California, Southern Division.

At a Stated Term of the Southern Division of the United States District Court for the Northern District of California, held at the Court Room thereof, in the City and County of San Francisco, on Monday, the 2nd day of April, in the year of our Lord one thousand nine hundred and forty-five.

Present: The Honorable A. F. St. Sure,
District Judge.

[Title of Cause.]

Order Overruling Demurrer of Blumenthal & Abel,
Denying Motions to Quash Indictment. Defendant Blumenthal Pleaded "Not Guilty".

This case came on regularly this day for hearing on the demurrers and motions of defendants Harry Blumenthal and Lewis Abel to quash the Indictment herein. After hearing Mr. Oppenheim and Mr. Wolff, attorneys for defendants, it is Ordered that the demurrers be overruled and that the motions to quash be denied.

Thereupon the defendant Harry Blumenthal was called to plead. Said defendant pleaded "Not Guilty" to the Indictment, which said plea was ordered entered. Said defendant demanded a trial by jury, and after hearing the attorneys, it is ordered that trial be set for May 8, 1945.

The defendant Lewis Abel not being present, it is ordered that this case be continued to April 4, 1945, for entry of plea of said defendant. [18]

District Court of the United States, Northern District of California, Southern Division.

At a Stated Term of the Southern Division of the United States District Court for the Northern District of California, held at the Court Room thereof, in the City and County of San Francisco, on Wednesday, the 4th day of April, in the year of our Lord one thousand nine hundred and forty-five.

Present: The Honorable A. F. St. Sure,
District Judge.

No. 29238

UNITED STATES OF AMERICA,

vs.

LOUIS ABEL.

DEFENDANT ABEL PLEADED "NOT
GUILTY"

This case came on regularly this day for entry of plea. The defendant, Louis Abel, was present in proper person and with his attorney, Harry K. Wolfer, Esq. Reynold H. Colvin, Esq., Assistant United States Attorney, was present on behalf of the United States.

The defendant was called to plead and thereupon said defendant pleaded "Not Guilty" to the Indictment filed herein against him, which said plea was ordered entered.

After hearing the attorneys, it is ordered that the trial of this case be set for May 8th, 1945. (Jury) [19]

District Court of the United States Northern District of California, Southern Division.

At a Stated Term of the Southern Division of the United States District Court for the Northern District of California, held at the Court Room thereof, in the City and County of San Francisco, on Monday, the 7th day of May, in the year of our Lord one thousand nine hundred and forty-five.

Present: The Honorable Louis E. Goodman,
District Judge.

No. 29238-G

UNITED STATES OF AMERICA,

vs.

HARRY BLUMENTHAL, et al.

ORDER CONTINUING TRIAL TO MAY 15, 1945

It appearing to the Court that it will be unable to try this case on May 10, 1945, it is ordered that this case be continued to May 15, 1945, at 10 a. m., for trial. (Jury) [20]

District Court of the United States, Northern District of California, Southern Division.

At a Stated Term of the Southern Division of the United States District Court for the Northern District of California, held at the Court Room thereof, in the City and County of San Francisco, on Tuesday, the 15th day of May, in the year of our Lord one thousand nine hundred and forty-five.

Present: The Honorable Louis E. Goodman,
District Judge.

[Title of Cause.]

MINUTES OF TRIAL

This case came on regularly this day for trial. Reynold H. Colvin, Esq., and James T. Davis, Esq., Assistant United States Attorneys, were present on behalf of the United States. Defendant Harry Blumenthal was present with his attorneys, Morris Oppenheim, Esq., and Thos. J. Riordan, Esq. Defendant Lewis Abel was present with his attorneys, Harry K. Wolff, Esq., and Sol A. Abrams, Esq. Lawrence B. Goldsmith was present with his attorneys, Arthur B. Dunne, Esq., and Walter Duané, Esq. Samuel S. Weiss was present and informed the Court that he would represent himself. Defendant Albert Feigenbaum was present with his attorney, Leo Friedman, Esq.

Thereupon the following persons, viz: [21] Mrs. Virginia Davidson, Mary K. Phelan, Jefferson A. Beaver, Boris M. Sutter, Miss Margaret Keily,

Martha A. Herman, Charles A. Jensen, Maurice M. Cohen, Ethel L. Fairbairn, Virginia J. Faldetta, Evangeline D. Exley, Sarah M. Falconer, twelve good and lawful jurors, were, after being duly examined under oath, accepted and sworn to try the issues joined herein. Mr. Colvin made a statement to the Court and jury on behalf of the United States. Almon C. Jones, Robert Otis Grubbs and Fred A. Sander were sworn and testified on behalf of the United States. Mr. Colvin introduced in evidence and filed U. S. Exhibits Nos. 1, 2, 3, 7, 8, 9, 10, 11, 12, 13, 14; and introduced U. S. Exhibits Nos. 4, 5 and 6 for identification. The hour of adjournment having arrived, the Court, after admonishing the jury, ordered that the further trial of this case be continued to May 16, 1945, at 1 p. m. [22]

District Court of the United States, Northern
District of California, Southern Division

At a Stated Term of the Southern Division of the United States District Court for the Northern District of California, held at the Court Room thereof, in the City and County of San Francisco, on Wednesday, the 16th day of May, in the year of our Lord one thousand nine hundred and forty-five.

Present: The Honorable Louis E. Goodman,
District Judge.

[Title of Cause.]

MINUTES OF TRIAL. DEFENDANT LEWIS
ABEL FINED \$50.00 FOR CONTEMPT OF
COURT.

The jury heretofore impaneled and the parties hereto being present as heretofore, with the exception of the defendant Lewis Abel, the Court took a recess while awaiting the appearance of defendant Lewis Abel. Upon the appearance of defendant Lewis Abel, the Court was called into session. In the absence of the jury, Mr. Wolff made apologies to the Court on behalf of defendant Lewis Abel. After hearing Mr. Wolff, Mr. Abrams and Lewis Abel, the Court found said defendant Lewis Abel Guilty of contempt of Court and ordered that said defendant pay a fine to the United States of America in the sum of Fifty (\$50.00) Dollars. Thereupon the jury was summoned into Court and trial was resumed. Joseph N. Nathanson, Frank Dito, Cecil E. Coghlan, Norman Reinburg and John Giometti were sworn and testified on behalf [23] of the United States. Mr. Colvin introduced U. S. Exhibits Nos. 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25 for identification. The hour of adjournment having arrived the Court, after admonishing the jury, ordered that the further trial of this case be continued to May 17, 1945, at 10 a. m.

District Court of the United States, Northern
District of California, Southern Division

At a ~~Said~~ Term of the Southern Division of
the United States District Court for the Northern
District of California, held at the Court Room
thereof, in the City and County of San Francisco,
on Thursday, the 17th day of May, in the year of
our Lord one thousand nine hundred and forty-five.

Present: The Honorable Louis E. Goodman,
District Judge.

[Title of Cause.]

MINUTES OF TRIAL

The jury impaneled herein and the parties hereto
being present as heretofore, the trial of this case
was this day resumed. Victor Figone, Melvyn
Avila, James Cernusco, John E. Vukota, V. M.
Lewis, Henry L. Taylor, Ruth Taylor, Raymond
C. Humes and Walter G. Vogel were sworn and
testified on behalf of the United States. Frank
Dito and Norman Reinburg were recalled for
further testimony. Mr. Wolff introduced in evi-
dence and filed defendant Abel's Exhibits A and B.
Mr. Friedman introduced defendant Feigenbaum's
Exhibit A for identification. Mr. Colvin intro-
duced U. S. Exhibits Nos. 26 to 46, inclusive, for
identification. The hour of adjournment having
arrived, the Court, after admonishing the jury,
ordered that the further trial of this case be con-
tinued to May 18, 1945, at 10 a. m. [25]

District Court of the United States, Northern
District of California, Southern Division

At a Stated Term of the Southern Division of
the United States District Court for the Northern
District of California, held at the Court Room
thereof,, in the City and County of San Francisco,
on Friday, the 18th day of May, in the year of
our Lord one thousand nine hundred and forty-five.

Present: The Honorable Louis E. Goodman,
District Judge.

[Title of Cause.]

MINUTES OF TRIAL

The parties hereto and the jury impaneled herein
being present as heretofore, the trial of this case
was this day resumed. Francis Duffy, Angelo
Lombardi, Herman Fingerhut, Walter H. Travis
and Edwin C. Harkins were sworn and testified on
behalf of the United States. Mr. Colvin intro-
duced U. S. Exhibits Nos. 47 to 60, inclusive, for
identification. Thereupon the Court, after admon-
ishing the jury, excused the jury until Tuesday,
May 22, 1945, at 10 o'clock A. M. Mr. Colvin
made a motion to admit in evidence U. S. Exhibits
heretofore marked for identification. After argu-
ment by the various attorneys for the defendants,
and the hour of adjournment having arrived, the
Court ordered that this case be continued to May
21, 1945, at 11 o'clock a. m. for argument on said
motion to admit the exhibits in evidence. [26]

District Court of the United States, Northern
District of California, Southern Division

At a Stated Term of the Southern Division of
the United States District Court for the Northern
District of California, held at the Court Room
thereof, in the City and County of San Francisco,
on Monday, the 21st day of May, in the year of
our Lord one thousand nine hundred and forty-five.

Present: The Honorable Louis E. Goodman,
District Judge.

[Title of Cause.]

MINUTES OF TRIAL.

At 10 o'clock A. M., this case came on regularly
this day for trial. Mr. Riordan, with the consent
of William E. Licking, Esq., Assistant United
States Attorney, made a motion to withdraw U. S.
Exhibits for Identification No. 52, 53, 58 and 60.
After hearing the attorneys, it is ordered that the
said exhibits be allowed to be withdrawn and placed
in the custody of Mr. Heinrich. The exhibits were
delivered by the Clerk to Mr. Heinrich, in open
Court.

At 11 o'clock A. M., the parties hereto were
present as heretofore. In the absence of the jury,
Mr. Colvin's motion to introduce evidence was
taken up. After hearing the arguments of Mr.
Friedman, Mr. Dunne, Mr. Colvin, Mr. Wolf, Mr.
Riordan and the defendant Samuel S. Weiss, it is
ordered that said motion be granted in part.

The hour of adjournment having arrived, it is ordered that the further trial of this case be continued to May 22, 1945 at 10 o'clock A. M. [27]

District Court of the United States, Northern
District of California, Southern Division

At a Stated Term of the Southern Division of the United States District Court for the Northern District of California, held at the Court Room thereof, in the City and County of San Francisco, on Tuesday, the 22nd day of May, in the year of our Lord one thousand nine hundred and forty-five.

Present: The Honorable Louis E. Goodman,
District Judge.

[Title of Cause.]

**MOTIONS FOR DIRECTED VERDICT OF
NOT GUILTY DENIED**

MINUTES OF TRIAL

The parties hereto and the jury hereofore impaneled being present as heretofore, the trial of this case was this day resumed. The Court ordered that all U. S. Exhibits heretofore introduced for identification be filed in evidence and so marked. Ordered that the motion made by Mr. Friedman and joined in by all defendants to exclude certain evidence be denied. Mr. Friedman, Mr. Dunne, Mr. Riordan, Mr. Wolff and the defendant Samuel S. Weiss made motions for directed verdict of not

guilty. After hearing the arguments of the attorneys and Mr. Weiss, it is ordered that said motions be denied. Thereupon all defendants rested, and the evidence was closed. After the arguments to the jury by Mr. Colvin, Mr. Dunne and Mr. Wolff, and the hour of adjournment having arrived, the Court, after admonishing the Jury, ordered that the further trial of this case be continued to May 23, 1945, at 10 a. m. [28]

In the Southern Division of the United States
District Court for the Northern District of
California

[Title of Cause.]

VERDICT

We, the Jury, find as to the defendants at the bar as follows:

Harry Blumenthal: Guilty.

Lewis Abel: Guilty.

Lawrence B. Goldsmith: Guilty.

Samuel S. Weiss: Guilty.

Albert Feigenbaum: Guilty.

ETHEL L. FAIRBAIRN

Foreman.

[Endorsed]: Filed May 23, 1945. [29]

District Court of the United States, Northern
District of California, Southern Division

At a Stated Term of the Southern Division of
the United States District Court for the Northern
District of California, held at the Court Room
thereof, in the City and County of San Francisco,
on Wednesday, the 23rd day of May, in the year
of our Lord one thousand nine hundred and forty-
five.

Present: The Honorable Louis E. Goodman,
District Judge.

[Title of Cause]

MINUTES OF TRIAL AND VERDICT OF JURY OF GUILTY

The parties hereto and the jury impaneled herein
being present as heretofore, the further trial of
this case was this day resumed. After hearing the
arguments by Mr. Weiss, Mr. Riordan, Mr. Fried-
man and Mr. Colvin, and the instructions of the
Court to the jury, the jury at 4:05 P. M. retired
to deliberate upon its verdict. At 6:00 P. M. the
jury returned into Court and upon being asked if
they had agreed upon a verdict, replied in the
affirmative and returned the following verdict which
was ordered recorded, viz:

"We, the Jury, find as to the defendants at the
bar as follows: Harry Blumenthal, Guilty; Lewis
Abel, Guilty; Lawrence B. Goldsmith, Guilty;
Samuel S. Weiss, Guilty; Albert Feigenbaum,
Guilty. Ethel L. Fairbairn, Foreman."

The jury upon being asked if said verdict as recorded is the verdict of the jury, each juror replied that it is. Ordered that the jury be excused from the further consideration [30] hereof, and that the jurors be excused until notified to report. Ordered that this case be continued to May 24, 1945, at 10 a. m. for pronouncing of judgment. Ordered that the defendants be remanded to the custody of the United States Marshal to await judgment and that mittimus issue.

[Title of Court and Cause.]

MOTION FOR A NEW TRIAL

Now comes the defendant Louis Abel in the above entitled action and moves this Honorable Court for an order vacating the verdict of the jury convicting said defendant, and granting defendant a new trial for the following, and each of the following, causes materially affecting his Constitutional rights, to wit:

1. That the verdict is contrary to the evidence adduced at the trial herein.
2. That the verdict is not supported by the evidence in the case.
3. That the evidence adduced at the trial is insufficient to justify said verdict.
4. That said verdict is contrary to law.
5. That the trial court erred in admitting evidence in the course of the trial where no proper foundation had been laid.

6. That the trial court erred in admitting evidence in the course of the trial which was hearsay.

7. That the trial court erred in denying defendant's motion made at the close of plaintiff's case, for a directed verdict of acquittal, for the reason that the legal evidence as a matter of law was insufficient to support a verdict of guilty.

8. That the trial court erred in denying defendant's motion made at the close of the entire case for a directed verdict of acquittal for the reason that the legal evidence as a matter of law was insufficient to support a verdict of guilty.

9. That the trial court erred in giving certain instructions of law to the jury and in refusing to give certain instructions of law requested by defendant to the jury. [32]

To all of which rulings defendant duly and regularly excepted.

This written motion, by leave of Court, supplements the oral motion heretofore made by said defendant, and is made upon the minutes of the Court, upon all records and proceedings in said action, and upon all the testimony and evidence introduced at the trial herein.

Dated: May 24, 1945.

HARRY K. WOLFF

SOL A. ABRAMS

Attorneys for said defendant

[Endorsed]: Filed May 24, 1945. [33]

[Title of Court and Cause.]

**MOTION OF LOUIS ABEL IN ARREST OF
JUDGMENT**

Comes now the defendant Louis Abel, in the above entitled action, and against whom a verdict of guilty was rendered on the 23rd day of May, 1945, in the above entitled cause, and moves the Court to arrest the judgment against said defendant and hold for naught the verdict of guilty rendered against said defendant for the following causes:

1. That the verdict is contrary to the evidence adduced at the trial herein.

2. That the verdict is not supported by the evidence in the case.

3. That the evidence adduced at the trial is insufficient to justify said verdict.

4. That said verdict is contrary to law.

5. That the trial court erred in admitting evidence in the course of the trial where no proper foundation had been laid.

6. That the trial court erred in admitting evidence in the course of the trial which was hearsay.

7. That the trial court erred in denying defendant's motion made at the close of plaintiff's case, for a directed verdict of acquittal, for the reason that the legal evidence as a matter of law was insufficient to support a verdict of guilty.

8. That the trial court erred in denying defend-

ant's motion made at the close of the entire case for a directed verdict of acquittal for the reason that the legal evidence as a matter of law was insufficient to support a verdict of guilty.

9. That the trial court erred in giving certain instructions of law to the jury and in refusing to give certain instructions of law requested by defendant to the jury. [34]

Wherefore, because of which said errors in the record hereof, no lawful judgment may be rendered by the Court, said defendant prays that this motion be sustained and that judgment of conviction against him be arrested and held for naught and that he have all such other orders as may seem meet and just in the premises.

This written motion is by leave of Court and supplements the oral motion heretofore made by said defendant, and is made upon the minutes of the Court, upon all records and proceedings in said action, and upon all the testimony and evidence introduced at the trial herein.

Dated: May 24, 1945.

HARRY K. WOLFF

SOL A. ABRAMS

Attorneys for said defendant

[Endorsed]: Filed May 24, 1945. [35]

[Title of Court and Cause.]

MOTION OF DEFENDANT HARRY BLUMENTHAL FOR A DIRECTED VERDICT

To the Honorable Louis E. Goodinan, U. S. District Judge:

Now comes Harry Blumenthal, one of the defendants in the above entitled action and objects to the taking of any further proceedings against said defendant under or by virtue of the said indictment and moves this Honorable Court to direct a verdict in favor of defendant, Harry Blumenthal, and to dismiss the said indictment for the following reasons, to-wit:

I.

That the said indictment does not state facts sufficient to constitute any crime or offense against the United States of America.

II.

That the Maximum Price Regulations 193 and 445 which the said indictment charges that this defendant conspired to commit are, and each of said regulations is, so indefinite and uncertain that it is impossible to determine what is meant thereby, or what acts are prohibited thereby, and in part that it is impossible to ascertain for what price it was lawful at the times mentioned and referred to in said indictment to sell the whiskey referred to in said indictment; and that by reason thereof each of the said regulations is void.

III.

That a conviction under the said indictment would be a violation of the provision of the Fifth Amendment of the Constitution of the United States that no person shall be deprived of life, liberty or property without due process of law; and that this Honorable Court accordingly has no jurisdiction to hear and determine [36] the above entitled cause, or to put this defendant to trial upon the said indictment.

IV.

That no conspiracy has been established.

V.

That the conspiracy charged herein does not constitute an offense under the Emergency Price Control Act or Sections 402A, 904A and 925B thereof, or the Price Administration Regulations or the Maximum Price Regulation 193 or Maximum Price Regulation 445, and that Title 18 of U. S. C., Section 88, is not applicable and does not embrace the conspiracy charged in the indictment herein.

Dated: May 1945.

MORRIS OPPENHEIM

THOS. J. RIORDAN

Attorneys for Defendant

Harry Blumenthal

[Endorsed]: Filed May 24, 1945. [37]

[Title of Court and Cause.]

MOTION FOR NEW TRIAL

Comes now defendant Harry Blumenthal and moves the court to set aside and vacate the verdict heretofore rendered herein on the following grounds:

1. That the verdict is against the law.
2. That the verdict is against the evidence.
3. That the verdict is not supported by the evidence.
4. That the court misdirected the jury in matters of law.
5. That the indictment and each of the counts therein contained do not state facts sufficient to constitute a public offense as against defendant, Harry Blumenthal.
6. That the court erred in denying the motion of defendant, Harry Blumenthal, for a directed verdict at the conclusion of the government's case.
7. That the court erred in denying defendant, Harry Blumenthal's motion for a directed verdict at the conclusion of the whole case.

MORRIS OPPENHEIM,

THOS. J. RIORDAN,

Attorneys for Defendant

Harry Blumenthal.

[Endorsed]: Filed May 24, 1945. [38]

[Title of Court and Cause.]

MOTION FOR NEW TRIAL

Comes now Albert Feigenbaum, defendant above-named, and moves the Court to set aside the verdict herein and grant him a new trial, upon the following grounds, to-wit:

1. The complaint does not state an offense against the laws of the United States.
2. The verdict is contrary to law.
3. The verdict is not supported by the evidence.
4. The Court upon the trial admitted incompetent evidence offered by the United States.
5. The Court improperly instructed the jury.
6. The Court refused to give correct instructions on the law as requested by defendant.
7. The Court erred in refusing to direct a verdict of "Not Guilty" at the close of all the evidence in the case.

Dated: May 24, 1945.

(Signed) LEO R. FRIEDMAN,

Attorney for said Defendant.

[Endorsed]: Filed May 24, 1945. [39]

[Title of Court and Cause.]

MOTION IN ARREST OF JUDGMENT

Comes now Albert Feigenbaum, one of the defendants above named; and moves the Court here to arrest judgment herein and not pronounce the same for the following reasons:

1. That said indictment does not state facts sufficient to constitute an offense under or against the laws of the United States.

2. That it appears from the record that judgment if made and entered would be unlawful.

3. That from the record it appears that the above entitled Court did not have jurisdiction over the offense sought to be alleged in the indictment.

4. That the indictment is not sufficient in form or substance to enable this defendant to plead the judgment in bar of another prosecution for the same offense.

Dated: May 24, 1945.

(Signed)

LEO R. FRIEDMAN,

Attorney for Said Defendant.

[Endorsed]: Filed May 24, 1945. [40]

[Title of Court and Cause.]

**MOTION OF DEFENDANT GOLDSMITH FOR
A NEW TRIAL**

Now Comes the defendant, Lawrence B. Goldsmith, in the above-entitled action and moves this Honorable Court for an order vacating the verdict of the jury convicting him and granting him a new trial on the indictment herein, for the following and each of the following causes, materially affecting the constitutional rights of said defendant:

1. That the verdict is contrary to the evidence adduced at the trial herein;

2. That the verdict is not supported by the evidence in the cause;

3. That the evidence adduced at the trial is insufficient to justify said verdict;

4. That the verdict is contrary to law;

5. That the trial court erred in admitting evidence in the course of the trial, which was incompetent, irrelevant and immaterial, which errors were duly and regularly excepted to by the defendant;

6. That the trial court erred in refusing to direct a verdict of not guilty at the close of the evidence of the United States;

7. That the trial court erred in refusing to strike out certain testimony which was incompetent, irrelevant, immaterial and hearsay;

8. That the trial court erred in refusing to di-

rect a verdict of not guilty at the close of all of the evidence;

9. That the trial court erred in admitting evidence in the course of the trial where no proper foundation had been laid. [41]

This motion is made upon the minutes of the court and upon all records and proceedings in said action and upon all of the testimony and evidence introduced at the trial.

Dated: May 24th, 1945.

WALTER H. DUANE,

ARTHUR B. DUNNE,

Attorneys for Defendant

Goldsmith.

[Endorsed]: Filed May 24, 1945. [42]

[Title of Court and Cause.]

**MOTION OF DEFENDANT GOLDSMITH IN
ARREST OF JUDGMENT**

Now Comes Lawrence B. Goldsmith, one of the defendants in the above-entitled action, against whom a verdict of guilty was rendered on the 23rd day of May, 1945, in the above-entitled cause, and moves the Court to arrest the judgment against him and hold for naught the verdict rendered against him.

1. That the indictment does not state facts sufficient to constitute a public offense under the laws of the United States.

2. That the evidence is not sufficient to support the verdict.

3. That the verdict of the jury is contrary to law.

Wherefore, because of which said errors in the record herein, no lawful judgment may be rendered by the Court and the said defendant prays that this motion be sustained and the judgment of conviction against him be arrested and held for naught, and that said defendant have all such other orders as may seem meet and just in the premises.

Dated: May 24th, 1945.

WALTER H. DUANE,

ARTHUR B. DUNNE,

Attorneys for Defendant

Goldsmith.

[Endorsed]: Filed May 24, 1945. [43]

District Court of the United States, Northern District of California, Southern Division.

At a Stated Term of the Southern Division of the United States District Court for the Northern District of California, held at the Court Room thereof, in the City and County of San Francisco, on Thursday, the 24th day of May, in the year of our Lord one thousand nine hundred and forty-five:

Present: The Honorable Louis E. Goodman,
District Judge.

[Title of Court.]

ORDER DENYING MOTIONS FOR NEW TRIAL AND IN ARREST OF JUDGMENT, SENTENCE, AND FIXING APPEAL BOND IN SUM OF \$2500.00.

This case came on regularly this day for the pronouncing of judgment. The defendants Harry Blumenthal, Lewis Abel, Lawrence B. Goldsmith, Samuel S. Weiss and Albert Feigenbaum were present in the custody of the United States Marshal. Morris Oppenheim and Thomas J. Riordan, Esqrs., were present on behalf of defendant Harry Blumenthal. Harry K. Wolff and Sol A. Abrams, Esqrs., were present on behalf of defendant Lewis Abel. Arthur B. Dunne and Walter Duane, Esqrs., were present on behalf of defendant Lawrence B. Goldsmith. Leo Friedman, Esq., was present on behalf of defendant Albert Feigenbaum. Motions for new trial and in arrest of judgment were made

by each defendant. After hearing the arguments, it is ordered that each motion be [44] denied.

The defendants were called for judgment. After hearing the defendants and the attorneys, and said defendants having been now asked whether they have anything to say why judgment should not be pronounced against them, and no sufficient cause to the contrary being shown or appearing to the Court, It Is By the Court

Ordered and Adjudged that the defendants Harry Blumenthal, Lewis Abel and Albert Feigenbaum, having been convicted on the verdict of the jury of guilty of the offense charged in the Indictment in the above-entitled case, each be committed to the custody of the Attorney General or his authorized representative for imprisonment for the period of Eight (8) Months and each pay a fine to the United States of America in the sum of One Thousand (\$1,000.00) Dollars.

Ordered and Adjudged that the defendants Samuel S. Weiss and Lawrence B. Goldsmith, having been convicted on the verdict of the jury of guilty of the offense charged in the Indictment in the above-entitled case, each be committed to the custody of the Attorney General or his authorized representative for imprisonment for the period of Two (2) Months and pay a fine to the United States of America in the sum of One Thousand (\$1,000.00) Dollars.

Ordered that judgment be entered herein accordingly as to each defendant.

It Is Further Ordered that the Clerk of this Court deliver a certified copy of each judgment and commitment to [45] the United States Marshal or other qualified officer and that the same shall serve as the commitments herein.

The Court recommends commitment to a County Jail.

Further ordered that defendants be released on \$2500.00 bond pending appeal. [46]

Judgment and Commitment

District Court of the United States, Northern District of California, Southern Division.

No. 29238-G

UNITED STATES,

vs.

HARRY BLUMENTHAL.

JUDGMENT AND COMMITMENT

Criminal Indictment in one count for violation of Title 18, U. S. C., Section 88.

On this 24th day of May, 1945, came the United States Attorney, and the defendant, Harry Blumenthal, appearing in proper person, and by counsel, and;

The defendant having been convicted on verdict of guilty of the offense charged in the Indictment in the above-entitled cause, to wit: Viol. Title 18, USC, Section 88. Defendant did, at a time and place unknown, unlawfully conspire with divers persons to sell whiskey at a price in excess of and higher.

than the maximum price established by law, and did commit various overt acts to effect the object of said conspiracy, and the defendant having been now asked whether he has anything to say why judgment should not be pronounced against him, and no sufficient cause to the contrary being shown or appearing to the Court, It Is by the Court

Ordered and Adjudged that the defendant, having been found guilty of said offense, is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for the period of Eight (8) Months, and pay a fine to the United States of America in the sum of One Thousand (\$1,000.00) Dollars.

Entered in Vol. 36 Judg and Decrees at Page 105.

It Is Further Ordered that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the same shall serve as the commitment herein.

Examined by:

REYNOLD H. COLVIN,

Assistant U. S. Attorney.

(Signed)

LOUIS E. GOODMAN,

United States District Judge.

The Court recommends commitment to the County Jail.

Filed and Entered this 24th day of May, 1945.

(Signed)

C. W. CALBREATH,

Clerk.

By R. E. WOODWARD,

Deputy Clerk. [47]

District Court of the United States, Northern District of California, Southern Division.

No. 29238-G.

UNITED STATES

vs.

LEWIS ABEL

JUDGMENT AND COMMITMENT

Criminal Indictment in one count for violation of Title 18, U. S. C., Section 88.

On this 24th day of May, 1945, came the United States Attorney, and the defendant, Lewis Abel, appearing in proper person, and by counsel, and,

The defendant having been convicted on verdict of guilty of the offense charged in the Indictment in the above-entitled cause, to wit: Viol. Title 18, USC, Section 88. Defendant did, at a time and place unknown, unlawfully conspire with divers persons to sell whiskey at a price in excess of and higher than the maximum price established by law, and did commit various overt acts to effect the object of said conspiracy, and the defendant having been now asked whether he has anything to say why judgment should not be pronounced against him, and no sufficient cause to the contrary being shown or appearing to the Court, It Is by the Court

Ordered and Adjudged that the defendant, having been found guilty of said offense, is hereby committed to the custody of the Attorney General or his

authorized representative for imprisonment for the period of Eight (8) Months, and pay a fine to the United States of America in the sum of One Thousand (\$1,000.00) Dollars.

Entered in Vol. 36, Judg. and Decrees, at Page 104.

It Is Further Ordered that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the same shall serve as the commitment herein.

Examined by:

REYNOLD H. COLVIN,

Assistant U. S. Attorney.

(Signed)

LOUIS E. GOODMAN,

United States District Judge.

The Court recommends commitment to a County Jail.

Filed and Entered this 24th day of May, 1945.

(Signed)

C. W. CALBREATH,

Clerk.

By R. E. WOODWARD,

Deputy Clerk. [48]

District Court of the United States, Northern District of California, Southern Division.

No. 29238-G

UNITED STATES,

vs.

SAMUEL S. WEISS.

JUDGMENT AND COMMITMENT-

Criminal Indictment in one count for violation of Title 18, U. S. C., Section 88.

On this 24th day of May, 1945, came the United States Attorney, and the defendant, Samuel S. Weiss, appearing in proper person, and by counsel, and,

The defendant having been convicted on verdict of guilty of the offense charged in the Indictment in the above-entitled cause, to wit: Viol. Title 18, USC, Section 88. Defendant did, at a time and place unknown; unlawfully conspire with divers persons to sell whiskey at a price in excess of and higher than the maximum price established by law, and did commit various overt acts to effect the object of said conspiracy, and the defendant having been now asked whether he has anything to say why judgment should not be pronounced against him, and no sufficient cause to the contrary being shown or appearing to the Court, It Is by the Court

Ordered and Adjudged that the defendant, having been found guilty of said offense, is hereby com-

mitted to the custody of the Attorney General or his authorized representative for imprisonment for the period of Two (2) Months, and pay a fine to the United States of America in the sum of One Thousand (\$1,000.00) Dollars.

Entered in Vol. 36, Judg. and Decrees, at Page 101.

It Is Further Ordered that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the same shall serve as the commitment herein.

Examined by:

REYNOLD H. COLVIN,

Assistant U. S. Attorney.

(Signed)

LOUIS E. GOODMAN,

United States District Judge.

The Court recommends commitment to a County Jail.

Filed and Entered this 24th day of May, 1945.

(Signed)

C. W. CALBREATH,

Clerk.

By R. E. WOODWARD,

Deputy Clerk. [49]

District Court of the United States, Northern District of California, Southern Division

No. 29238-G

UNITED STATES,

vs.

ALBERT FEIGENBAUM.

JUDGMENT AND COMMITMENT

Criminal Indictment in one count for violation of Title 18, U. S. C., Section 88.

On this 24th day of May, 1945, came the United States Attorney, and the defendant, Albert Feigenbaum, appearing in proper person, and by counsel, and,

The defendant having been convicted on verdict of guilty of the offense charged in the Indictment in the above-entitled cause, to wit: Viol. Title 18, USC, Section 88. Defendant did, at a time and place unknown, unlawfully conspire with divers persons to sell whiskey at a price in excess of and higher than the maximum price established by law, and did commit various overt acts to effect the object of said conspiracy, and the defendant having been now asked whether he has anything to say why judgment should not be pronounced against him, and no sufficient cause to the contrary being shown or appearing to the Court, It Is by the Court

Ordered and Adjudged that the defendant, having

been found guilty of said offense, is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for the period of Eight (8) Months, and pay a fine to the United States of America in the sum of One Thousand (\$1,000.00) Dollars.

Entered in Vol. 36, Judg. and Decrees, at Page 103.

It Is Further Ordered that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer, and that the same shall serve as the commitment herein.

Examined by:

REYNOLD H. COLVIN,

Assistant U. S. Attorney.

(Signed)

LOUIS E. GOODMAN,

United States District Judge.

The Court recommends commitment to a County Jail.

Filed and Entered this 24th day of May, 1945.

(Signed)

C. W. CALBREATH,

Clerk.

By R. E. WOODWARD,

Deputy Clerk. [50]

District Court of the United States, Northern District of California, Southern Division.

No. 29238-G

UNITED STATES

vs.

LAWRENCE B. GOLDSMITH.

JUDGMENT AND COMMITMENT

Criminal Indictment in one count for violation of Title 18, U. S. C., Section 88.

On this 24th day of May, 1945, came the United States Attorney, and the defendant, Lawrence B. Goldsmith, appearing in proper person, and by counsel, and

The defendant having been convicted on verdict of guilty of the offense charged in the Indictment in the above-entitled cause, to wit: Viol. Title 18, USC, Section 88. Defendant did, at a time and place unknown, unlawfully conspire with divers persons to sell whiskey at a price in excess of and higher than the maximum price established by law and did commit various overt acts to effect the object of said conspiracy, and the defendant having been now asked whether he has anything to say why judgment should not be pronounced against him, and no sufficient cause to the contrary being shown or appearing to the Court, It Is by the Court

Ordered and Adjudged that the defendant, having been found guilty of said offense, is hereby com-

mitted to the custody of the Attorney General or his authorized representative for imprisonment for the period of Two (2) Months, and pay a fine to the United States of America in the sum of One Thousand (\$1,000.00) Dollars.

Entered in Vol. 36, Judg. and Decrees, at Page 102.

It Is Further Ordered that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the same shall serve as the commitment herein.

Examined by:

REYNOLD H. COLVIN,

Assistant U. S. Attorney.

(Signed) LOUIS E. GOODMAN,

United States District Judge.

The Court recommends commitment to a County Jail.

Filed and Entered this 24th day of May, 1945.

(Signed) C. W. CALBREATH,

Clerk.

By R. E. WOODWARD,

Deputy Clerk. [51]

[Title of Court and Cause.]

NOTICE OF APPEAL

Name and address of Appellant: Louis Abel,
County Jail, City and County of San Francisco,
State of California.

Name and address of Appellant's attorneys:
Harry K. Wolff, Central Tower, and Sol. A.
Abrams, 406 Montgomery Street, San Francisco,
California.

Offense: A violation of 18 USC 88 (conspiracy).

That the defendant did, in the November, 1944,
term of court, knowingly, unlawfully, wilfully, cor-
ruptly and feloniously, conspire, combine, confed-
erate, arrange and agree, together with Harry Blu-
menthal, Lawrence B. Goldsmith, Samuel S. Weiss
and Albert Feigenbaum, and divers other persons
whose names are unknown to the Grand Jurors, to
commit offenses against the United States of Amer-
ica and laws thereof, the offenses being to know-
ingly, wilfully and unlawfully sell at wholesale cer-
tain distilled spirits, to wit, Old Mr. Boston Rock-
ing Chair Whiskey, in excess of and higher than the
maximum price established by law, said maximum
price at wholesale then and there being not in ex-
cess of \$25.27 per case of twelve bottles, each of
said twelve bottles containing one-fifth of one gal-
lon of said Old Mr. Boston Rocking Chair Whis-
key, in violation of Sections 902(a), 904(a), and
925(b) of Title 50, U.S.C.A. App., and Office of

Price Administration Regulations: Maximum Price Regulation 193 and Maximum Price Regulation 445.

Date of Judgment: May 24th, 1945.

Description of Judgment and Sentence:

Judgment: Defendant "guilty" as charged in said indictment above set forth. [52]

Sentence: Imprisonment for eight (8) months and pay a fine of One Thousand Dollars (\$1,000.00).

Name of Prison where now confined: County Jail of the City and County of San Francisco.

I, the above-named appellant, hereby appeal to the United States Circuit Court of Appeal of the Ninth Circuit, from the judgment above-mentioned, on the grounds set forth below.

LOUIS ABEL,

Appellant.

HARRY K. WOLFF,

SOL A. ABRAMS,

Attorneys for Appellant.

GROUND OF APPEAL

I.

That the learned trial judge committed errors in law arising during the course of the trial and erred in the decision of questions of law arising during the course of the trial.

II.

That the evidence produced and received upon

the trial of said cause was insufficient as a matter of law to justify the verdict of the jury.

III.

That the learned trial judge erred in allowing hearsay evidence upon the trial of said cause.

IV.

That the learned trial judge erred in admitting evidence in the course of the trial where no proper foundation had been laid. [53]

V.

That the learned trial judge erred in denying appellant's motion, made at the close of appellee's case, for a directed verdict of acquittal for the reason that the legal evidence as a matter of law was insufficient to support a verdict of guilty.

VI.

That the learned trial judge erred in denying appellant's motion, made at the close of the entire case, for a directed verdict of acquittal for the reason that the legal evidence as a matter of law was insufficient to support a verdict of guilty.

VII.

That the learned trial judge erred in denying appellant's motion for a new trial made after the verdict and before the pronouncement of sentence, upon the grounds orally stated at the time, and supplemented by written motion filed immediately thereafter.

VIII.

That the learned trial judge erred in denying appellant's motion for arrest of judgment made after the verdict and before the pronouncement of sentence, upon the grounds orally stated at the time and supplemented by written motion filed immediately thereafter.

IX.

That the learned trial judge erred in giving certain instructions of law to the jury and in refusing to give certain instructions of law requested by defendant to the jury.

[Endorsed]: Filed May 24, 1945. [54]

[Title of Court and Cause.]

NOTICE OF APPEAL OF HARRY
BLUMENTHAL

Name and address of appellant: Harry Blumenthal, 100 Junipero Serra Boulevard, San Francisco, Calif.

Names and addresses of appellant's attorneys: Morris Oppenheim, Phelan Building, San Francisco, Calif.; Thos. J. Riordan, Russ Building, San Francisco, Calif.

Offense: Violation: Title 18, U. S. Code 88 (Crim. Code 37). Conspiracy to violate Title 50 U.S.C. appendix Emergency Price Control Act, Section

902A, 904A and 925B thereof and regulations thereunder No. 193, and 445 and amendments thereto.

Date of Judgment: May 24th, 1945.

Brief description of judgment or sentence: 8 months in County Jail in San Francisco; \$1000.00 Fine.

Name of prison where now confined if not on bail. On bail.

I, the above named appellant, hereby appeal to the United States Circuit Court of Appeals for the Ninth Circuit from the judgment above mentioned on the grounds set forth below.

Pursuant to Rule V, I hereby serve notice that I do not elect to enter upon the service of sentence pending appeal.

Dated: May 24th, 1945.

HARRY BLUMENTHAL
Appellant

THOS. J. RIORDAN
MORRIS OPPENHEIM

Attorneys for Appellant

GROUND OF APPEAL

I.

That the verdict was not supported by the evidence. [55]

II.

That the verdict was contrary to law.

III.

That the verdict was contrary to the evidence.

IV.

That the verdict was contrary to the law and the evidence.

V.

Insufficiency of the evidence to sustain the verdict.

VI.

Plain errors of law occurring at the trial and not excepted to.

VII.

Plain errors of law occurring at the trial and not excepted to by which the defendant, Harry Blumenthal, was denied a fair and impartial trial.

VIII.

The judgment is contrary to the law.

IX.

The indictment fails to state a public offense against the laws of the United States.

X.

There is no reasonable or probable cause upon which the indictment was based.

XI.

The Court erred in overruling appellant's demurrers and motion to quash. [56]

XII.

Title 18, U. S. Code 88 (Criminal Code 37) con-

spiracy to violate title 50 U.S.C. Appendix, Sections 902A, 904A and 925B thereof and regulations thereunder Nos. 193 and 445 and amendments thereto, inherently and as construed and applied in this case is unconstitutional.

HARRY BLUMENTHAL

Appellant

THOS. J. RIORDAN

MORRIS OPPENHEIM

Attorneys for Appellant

[Endorsed]: Filed May 24, 1945. [57]

[Title of Court and Cause.]

NOTICE OF APPEAL

Name and Address of Appellant: Albert Feigenbaum, 2481 Mission Street, San Francisco, Calif.

Name and Address of Appellant's Attorney: Leo R. Friedman, 935 Russ Building, San Francisco, California.

Offense: Violating 18 U.S.C.A. sec. 88. (Conspiracy to sell whiskey in excess of maximum price.)

Date of Judgment: May 24, 1945.

Description of Judgment and Sentence: Imprisonment for term of 8 mos. County Jail. Fine of \$1000.00.

Name of Prison Where Confined: On Bail.

I, the above named appellant, hereby appeal to

the United States Circuit Court of Appeals for the Ninth Circuit from the judgment above mentioned on the grounds set forth below.

Dated: May 24, 1945.

ALBERT FEIGENBAUM

Appellant [58]

GROUND OF APPEAL

1. The indictment does not state an offense against the laws of the United States.

2. The Court did not have jurisdiction of the charge and offense set forth in the indictment.

3. The verdict is contrary to law.

4. The evidence was insufficient to support either the verdict or judgment.

5. The Court erred in denying appellant's motion for a directed verdict of not guilty made at the close of all the testimony and evidence in the case.

6. The Court erred in admitting incompetent evidence offered by the United States.

7. The Court improperly instructed the jury, to the substantial prejudice of appellant.

8. The Court refused, to the substantial prejudice of appellant, to give correct instructions on the law requested by appellant.

9. The Court erred in permitting the jury to consider acts and declarations of alleged co-conspirators, made out of the presence of appellant, in determining whether the conspiracy charged existed and whether the appellant was a member thereof.

[Endorsed]: Filed May 24, 1945. [59]

[Title of Court and Cause.]

NOTICE OF APPEAL OF DEFENDANT
GOLDSMITH

Name and Address of Appellant: Lawrence B. Goldsmith, 2100 Pacific Avenue, San Francisco, California.

Names and Addresses of Appellant's Attorneys: Walter H. Duane, 790 Mills Building, 220 Montgomery Street, San Francisco 4, California, and Arthur B. Dunne, 333 Montgomery Street, San Francisco 4, California.

Offense: Conspiracy to violate the Emergency Price Control Act, Title 50 U.S.C.A. App. Sections 902 (a) 904 (a) and 925 (b), as follows:

That the defendant, with others, within the said Division and District, did knowingly, wilfully, unlawfully and corruptly conspire, combine, confederate, arrange and agree with others to commit offenses against the United States, to-wit: to knowingly, wilfully and unlawfully sell at wholesale certain distilled spirits, to-wit: Old Mister Boston Rocking Chair Whiskey, in excess of and higher than the maximum price established by law, and in pursuance of said conspiracy and to accomplish the purpose thereof the said defendant and Samuel S. Weiss, a co-defendant, on or about the 10th day of January, 1944, at the City and County of San Francisco, State of California, completed and delivered to one John Giometti invoice No. 10171 of the Francisco Distributing Company, and that on or about the 5th day of January, 1944, at the City and County of San Francisco, State of California, said

defendant and said Samuel S. Weiss, a co-defendant, shipped 25 cases of Old Mister Boston Rocking Chair Whiskey to Herman Fingerhut at Vallejo, California.

Date of Judgment: May 24, 1945.

Description of Judgment and Sentence: "Guilty" as charged in said indictment, as above set forth; Two (2) months in the County Jail of the City and County of San Francisco and a [60] fine of One Thousand Dollars (\$1,000.00).

Name and Prison Where Now Confined: County Jail of the City and County of San Francisco.

I, the above named appellant, hereby appeal to the United States Circuit Court of Appeal of the Ninth Circuit, from the judgment above mentioned, on the grounds set forth below:

GROUND'S OF APPEAL

I.

That the learned Trial Judge committed errors in law arising during the course of the trial, and erred in the decision of questions of law arising during the course of the trial.

II.

That the evidence produced and received upon the trial of said cause was insufficient as a matter of law to justify the verdict of the jury.

III.

That the learned Trial Judge erred in denying

the motion made by counsel for defendant for a directed verdict of "Not Guilty" at the conclusion of the case of the prosecution, for the reason that taking said evidence in said case is not sufficient as a matter of law to support a verdict of "Guilty."

IV.

That the Trial Court erred in not instructing the jury to return a verdict of "Not Guilty" in favor of appellant.

Dated: May 24, 1945.

LAWRENCE B. GOLDSMITH

Appellant

WALTER H. DUANE

ARTHUR B. DUNNE

Attorneys for Appellant

[Endorsed]: Filed May 24, 1945. [61]

[Title of Court and Cause.]

NOTICE OF APPEAL OF SAMUEL S. WEISS

Name and address of appellant: Samuel S. Weiss,
Fielding Hotel, San Francisco, Calif.

Name and address of appellant's attorney: (in
propria persona).

Offense: Violation: Title 18, U. S. Code 88 (Crim.
Code 37) Conspiracy to violate Title 50 U.S.C.
appendix, Emergency Price Control Act, Sections
902A, 904A and 925B thereof and regulations there-
under No. 193 and 445 and amendments thereto.

Date of judgment: May 24, 1945.

Brief description of judgment or sentences: Sentence 2 months, fined \$1000.00.

Name of prison where now confined if not on bail:

I, the above named appellant, hereby appeal to the United States Circuit Court of Appeals for the Ninth Circuit from the judgment above mentioned on the grounds set forth below.

Pursuant to Rule V, I hereby serve notice that I do not elect to enter upon the service of sentence pending appeal.

Dated: May 25, 1945.

SAMUEL S. WEISS

Appellant

In propria persona.

Attorney for Appellant

GROUND'S OF APPEAL

I.

That the verdict was not supported by the evidence.

II.

That the verdict was contrary to law.

III.

That the verdict was contrary to the evidence.

IV.

That the verdict was contrary to the law and the evidence.

V.

Insufficiency of the evidence to sustain the verdict.

VI.

Plain errors of law occurring at the trial and not excepted to.

VII.

Plain errors of law occurring at the trial and not excepted to by which the defendant, Samuel Weiss, was denied a fair and impartial trial.

VIII.

The judgment is contrary to the law.

IX.

The indictment fails to state a public offense against the laws of the United States.

X.

There is no reasonable or probable cause upon which the indictment was based.

XI.

The court erred in overruling appellant's demurrers and motion to quash.

XII.

Title 18, U. S. Code 88 (Criminal Code 37) conspiracy to violate title 50 U.S.C. Appendix, Sections 902A, 904A, and 925B thereof and regulations thereunder Nos. 193 and 445 and amendments thereto,

inherently and as construed and applied in this case is unconstitutional.

SAMUEL S. WEISS

Appellant

In propria persona

Attorney for Appellant

[Endorsed]: Filed May 25, 1945. [63]

[Title of Court and Cause.]

ASSIGNMENT OF ERRORS OF DEFENDANT
HARRY BLUMENTHAL

Now Comes Harry Blumenthal, one of the defendants and appellants in the cause numbered and entitled as above, who has heretofore appealed to the United States Circuit Court of Appeals for the Ninth Circuit from the judgment and sentence given, made and entered against him in said cause in and by the said District Court, and, having duly given his notice of appeal in the manner and form provided by law, and by the Rules adopted and promulgated by the Supreme Court of the United States governing appeals in criminal cases, files this, his assignment of the errors upon which he will rely for a reversal of the judgment and sentence, aforesaid, and says, that in the record and proceedings aforesaid, as also in the judgment of the plea herein, manifest error hath happened to the grievous damage of him, the said Harry Blumenthal, in each and every of the following particulars, to-wit:

I.

That the said District Court erred in its order overruling the demurrer of said defendant Harry Blumenthal to the indictment in the above-entitled cause, to which order and ruling of said District Court this defendant duly Excepted.

II.

That said District Court erred in its order denying the motion of this defendant Harry Blumenthal to quash and set aside the said indictment and hold the same for naught, to which order and ruling of the said District Court the said defendant Harry Blumenthal duly Excepted. [65]

III.

That said District Court erred in granting the motion of counsel for the United States of America, made at the conclusion of the taking of testimony upon the trial of said cause, to admit all evidence which had been admitted against any defendant as against all defendants and to admit all documents theretofore marked for identification in evidence against all the defendants, to which ruling of the said District Court counsel for this defendant Harry Blumenthal duly Excepted.

IV.

That the said District Court erred in denying the motion of counsel for this defendant at the conclusion of the case for the Government that the court instruct the jury to find this defendant not guilty, to which ruling and order of the said District Court

counsel for this defendant Harry Blumenthal duly Excepted.

V.

That said District Court erred in denying the motion made by counsel for said defendant Harry Blumenthal after all the testimony and evidence had been introduced and both sides had rested the case for an instructed verdict of not guilty as to said defendant Harry Blumenthal, to which ruling and order of the said District Court counsel for this defendant Harry Blumenthal duly Excepted.

VI.

That the said District Court erred in denying the motion of said defendant Harry Blumenthal for a new trial, to which ruling and order of the said District Court counsel for this defendant Harry Blumenthal duly Excepted. [66]

VII.

That said District Court erred in denying the motion of said defendant Harry Blumenthal in arrest of judgment, to which order and ruling of said District Court counsel for said defendant Harry Blumenthal duly Excepted.

VIII.

That the said District Court, upon the trial of said cause, erred in admitting in evidence over the objection of counsel for said defendant, "U. S. Exhibit 2," the said exhibit being a document entitled "Wholesale Liquor Dealers Monthly Report Summary of Forms 52-A and 52-B," showing the

purchases of the Francisco Distributing Company during the month of December, 1943, as kept in the records of the United States Internal Revenue Department, to which ruling of the court counsel for said defendant Harry Blumenthal then and there duly Excepted.

IX.

That the said District Court, upon the trial of said cause, erred in admitting in evidence over the objection of counsel for said defendant, "U. S. Exhibit 3," the said exhibit being a document entitled "Wholesale Liquor Dealers Monthly Report Summary of Forms 52-A and 52-B," showing the purchases of the Francisco Distributing Company during the month of January, 1944, as kept in the records of the United States Internal Revenue Department, to which ruling of the court counsel for said defendant Harry Blumenthal then and there duly Excepted.

X.

That the said District Court erred in admitting in evidence over the objection of counsel for said defendant Harry Blumenthal "U. S. Exhibits 4, 5 and 6," the same [67] being the so-called 52-A and 52-B records of the Francisco Distributing Company which had been filed with said United States Internal Revenue Department from the month of March, 1942, to the month of December, 1943, to which ruling of the court counsel of said defendant Harry Blumenthal then and there duly Excepted.

XI.

That the said District Court erred in denying the

motion of counsel for said defendant Harry Blumenthal to strike out all the evidence of the witness Robert Otis Grubbs, which said evidence was, and is, as follows, to-wit:

“Direct Examination by Mr. Colvin

I am known as Chief Claims Clerk, Santa Fe Railroad, San Francisco. I have seniority back to 1911, but I have worked for them several times before that. It dates back as far as 1902. I have held this particular position since 1919. I appear under subpoena from the Clerk of the District Court. That subpoena directed me to bring with me certain freight bills. I have them with me. (Thereupon a freight bill produced by the witness was marked ‘U. S. Exhibit 7’ for identification.) (Another bill of lading was marked ‘U. S. Exhibit 8’ for identification.)

The Witness Testified:

Those two freight bills are kept as a permanent office file pursuant to the conduct of the Santa Fe’s business. The documents now shown me are copies of the original records No. 7 and No. 8. (Thereupon, ‘U. S. Exhibits 7 and 8’ for identification [68] were received in evidence.”

to which ruling of the court counsel for said defendant Harry Blumenthal then and there duly Excepted.

XII. :

That said District Court erred in denying the motion of said defendant Harry Blumenthal to

strike out the following testimony of the witness Fred A. Sander:

"1426 cases were delivered from the car on arrival"

upon the ground that the same was incompetent, irrelevant, immaterial and hearsay, to which ruling of the court counsel for said defendant Harry Blumenthal then and there duly Excepted.

XIII.

That the said District Court erred in overruling the objection of counsel for said defendant Harry Blumenthal to the following question asked by counsel for the Government:

"Q. Mr. Sanders, who, if anyone, instructed you regarding the unloading of the two freight cars whose numbers appear in your records?"

and in permitting the witness to answer the said question as follows, to-wit:

"The instructions came through a Mr. Weiss, representing himself as Francisco Distributing Company. Mr. Weiss personally gave me those instructions. I held a conversation with Mr. Weiss covering the unloading of these cars. The conversation took place to the best of my knowledge at our office. The date of the conversation was on or about December 15, 1943. Nobody was present beside Mr. Weiss and myself." [69]

to which ruling of the Court counsel for said de-

fendant Harry Blumenthal then and there duly Excepted.

XIV.

That the said District Court erred in admitting in evidence the following testimony of the said witness Sanders with reference to the conversation referred to in the last assignment, to-wit:

“Q. What was the content of this conversation relating to those shipments?”

Counsel for the defendant Blumenthal objected to the question on the ground that it was incompetent, irrelevant and immaterial, hearsay, no part of the res gestae so far as the defendant Blumenthal was concerned, and not within the issues of the charge of conspiracy as far as the defendant Blumenthal was concerned, and asked the court that if the conversation was related, that the jury be instructed to disregard the statement as to the defendant Harry Blumenthal. The court stated that it would not instruct the jury to disregard the statement, to which ruling of the court counsel for defendant Blumenthal duly Excepted.

“(The Witness Continuing):

Mr. Weiss came in to ask us if we could handle the cars or distribution for him, and after a little consultation about it in our distributing office we finally agreed to accept the car for him and distribute it and asked him to give us his address. He said he would arrange to have them down to us. I subsequently received certain orders from Mr. Weiss. They are all together here in the file. This

is the merchandise which was delivered ex car 1426 cases. [70]

When I refer to 'this car', I mean that car for which receipt was dated December 17, 1943. The number of that car was PRR 568,500."

XIV.

That said District Court erred in admitting in evidence over the objection of the defendant Blumenthal the following evidence, oral and documentary, during the testimony of the witness Sander: "These papers were handed to me by Mr. Weiss at our office, 625 Third Street, San Francisco. We did not have the cars in our possession. We had advised Mr. Weiss to pay the freight, surrender the bills of lading, so we could get the cars into the warehouse. We subsequently got possession of the merchandise in these cars and made delivery of it in accordance with these documents."

Thereupon, the Court admitted the document (U. S. Exhibit 10) in evidence, to which ruling counsel for defendant Blumenthal duly excepted.

XV.

That the said District Court erred in giving the following instruction to the jury during the course of the examination of the witness Joseph N. Nathanson, as more fully appears from the record as follows, to-wit:

"The Court: I will instruct the jury at the present time that pursuant to the authority given to him by statute; the Price Administrator on May 22, 1943, promulgated an Order No. 5 in which he

fixed the maximum prices for all sales [71] by Ben Burke, Inc., Foster & Company, and American Distilling Company as follows: That on or after May 24, 1943 Ben Burke, Inc., Boston, Massachusetts, Foster & Company, New York City, and American Distilling Company, Beacon, Illinois, may sell and deliver to any person, and any person may buy and receive from those sellers Old Mr. Boston Rocking Chair whiskey, a blend of straight Bourbon whiskies, 80.6 proof, aged as above, at the following prices: \$19.24—that is not in issue; that is another kind of whiskey?

Mr. Colvin: That is for pints.

The Court: \$15.37 plus \$3.87, being the amount of the increased Federal excise tax of November 1, 1942 applicable thereto, or a total of \$19.24 per case of 12 bottles, each bottle containing one-fifth gallon of such whiskey.

Now, do you wish to take an exception to that?

Mr. Friedman: Yes, your Honor. I wish to object to what your Honor has told the jury, and I ask your Honor to instruct the jury to disregard anything you have just read from the Federal Register or advised them about, upon the following grounds:

First, that the purported order is only an order that regulates processors of these particular distilled spirits; it has nothing to do with wholesalers; it has nothing to do with [72] people who buy from wholesalers or jobbers—that is the portion you have instructed the jury about—and therefore that this portion of the order is not bind-

ing upon Mr. Feigenbaum in this case, who is neither a processor nor a wholesaler of distilled spirits.

Secondly, upon the ground that the order on its face is in violation and in excess of the power conferred by the Emergency Price Control Act for these reasons: That under the Emergency Price Control Act the Administrator has the power by general order and by general order only to fix the prices of any commodity within a particular area or region, and that he has not the power and never was given the power by Congress to fix different prices for different people for the manufacture of the same kind of article, and this is a special order applicable only to certain people.

The Court: Do you propose to follow this up with further regulations with respect to the prices fixed for sale at wholesale?

Mr. Colvin: Yes, your Honor.

The Court: And this is preliminary to that?

Mr. Colvin: Yes, your Honor.

The Court: I will overrule the objection, and an exception may be noted.

Mr. Duane: If the Court please, in behalf of the defendant Goldsmith I desire to offer the objection that this testimony and this [73] regulation for this purpose is incompetent, irrelevant and immaterial. We are not here charged with any dealings with Burke or the American Distillery or anyone else.

The Court: I understand that.

Mr. Duane: We urge our objection on that ground.

The Court: I have instructed the jury as to that regulation and overrule the objection upon the statement of the District Attorney that it is preliminary to showing a further price regulation for sales by wholesalers. There may be some connection there. I can't see that that would do any harm.

Mr. Friedman: I would ask your Honor to limit this testimony so that it does not go in as against the defendant Feigenbaum, who is not within either of the categories mentioned by Mr. Colvin.

Mr. Riordan: Before the Court rules on that may I for the record, for the defendant Blumenthal, adopt the objections made by Mr. Friedman and Mr. Duane, and object upon the further ground that it is an unlawful delegation of power in any event, also reiterating Mr. Friedman's objection particularly as to Mr. Blumenthal, that this is in no way binding upon the defendant Blumenthal as far as this evidence goes, because of the fact that there is no tie-in regarding any records here, everything that has been introduced at this time concerning it, I realize your Honor has that in mind.

The Court: I will instruct the jury that the instructions as to this order of the Price [74] Administrator are now only being considered by the jury as against the defendant Goldsmith and if it is connected up with the other defendants it may be admitted later as to them.

Mr. Duane: May I, then, in behalf of the defendant Goldsmith, your Honor, make this further objection: that the order referred to an order promulgated by the Office of Price Administration, and the Price Administrator, is invalid and void, and that such order was adopted by the use of a delegation of power which of itself was invalid in this case.

The Court: That objection will be overruled and an exception noted.

Mr. Duane: Exception.

Mr. Riordan: Exception.

XVI.

That the said District Court erred in admitting, over the objection of the defendant Blumenthal, the following testimony of the witness Norman Reinberg:

“Q. Were 100 cases of Old Boston Rocking Chair Whiskey delivered to you?”

Counsel for the defendant Blumenthal objected to the question upon the ground that it was incompetent, irrelevant and immaterial and called for the opinion and conclusion of the witness. The Court overruled the objection, to which counsel for the defendant Blumenthal duly Excepted.

XVII.

That the said District Court overruled in admitting the following testimony of the witness Reinburg over the objection of the defendant Blumenthal: [75]

“During this period of time I traveled to San

Francisco with Mr. Abel on two occasions. The first occasion was about the 6th or 7th of December. I took Mr. Abel with me in my car. I took him in the downtown section here, about three or four blocks off Market, around Third or Fourth. The place was a jewelry store, pawn shop, sports-goods. I left Mr. Abel off at this sports-goods shop. I had a conversation I would pick him up in half an hour. I drove down there on the date of the first trip at Mr. Abel's direction. He did not say to drive to this particular sports shop. He said, 'Up that street, down that, and stop here.'

to which ruling counsel for the defendant Blumenthal duly Excepted.

XVIII.

That the said District Court erred in admitting in evidence over the objection of the defendant Blumenthal the following testimony of the witness John Giometti:

"I have the Owl Cafe, 121 Georgia Street, Vallejo, California, and hold a liquor license at those premises. I was in that business during the month of December, 1943, and the month of January, 1944. During those months, I purchased some Old Mr. Boston Rocking Chair Whiskey from the Francisco Distributing Company. I paid 65c a case for that whiskey. I gave a check to Norman Reinburg and the cash to get me the whiskey."

to which ruling, counsel for the defendant Blumenthal duly Excepted. [76]

XIX.

That the said District Court erred in admitting in evidence over the objection of the defendant Blumenthal the following testimony of the witness James Cermusco:

"Mr. Colvin: At whose direction did you stop at that place on Third Street?"

Mr. Riordan: I object to that as incompetent, irrelevant and immaterial as to defendant Blumenthal. We are not bound by any directions."

The Court overruled the said objection, to which counsel for defendant Blumenthal duly Excepted.

"The witness: (To the Court) The man who was driving the car stopped there. He was the man who said he came from the Francisco Distributing Company."

XX.

That the said District Court erred in admitting the following evidence over the following objections of counsel for the defendant Blumenthal upon the examination of the witness James Cermusco, to which counsel for the defendant Blumenthal duly Excepted:

"The check for \$2,000 dated December 14th marked 'U. S. Exhibit 31' for identification was given to a man who said he was a salesman at the same time the Dakota check for \$2,000 was given to him. Both of these checks were given at the same time. I gave Government's Exhibit for identification No. 29 and Government's Exhibit for identification No. 30, each for \$450 to the man who said he was [77] the salesman at the same time.

I gave that man the \$450 check on Townsend Street, near the Clarke Draying Company. At the time I gave him the check I gave him \$6,100 in cash. We drove up Third Street stopped for a while, and then, from there we came down to Townsend Street. I couldn't very clearly say what I was talking about at that time. I had a conversation the time I stopped on Third Street that day as to where the whiskey was, and they said it was in the San Francisco Warehouse Company.

Q. What did you say to that?

Mr. Riordan: I object to this on the ground it is hearsay as to the defendant Blumenthal. It is completely hearsay as to him. The court overruled the said objection, to which counsel for the defendant Blumenthal duly Excepted.

(The Witness Continuing): Well, he says the San Francisco Warehouse, so we drove up the street, Third Street, and, like I said, we stopped the car on Third Street, between Mission and Market, and from there, we drove around and came back to Townsend Street, which the San Francisco Warehouse is around the corner from, Third Street, and then we went and seen that the whiskey was there, which it was, and from there on he said 'Here is the bills for the whiskey', and he wanted the money. So there we went back into the car, gave him the money and he gave me the bill of ladings, or bills of whiskey—I don't know what they were.

(To the Court): He said it was in the San [78]

Francisco Warehouse; he had to get some bill of lading, some receipts for the whiskey."

XXI.

That the said District Court erred during the testimony of the witness Angelo Lombardi, in admitting the following evidence, when the said witness was testifying as to a transaction with on, Minkler, out of the presence of the defendant Blumenthal, and in overruling the objection thereto as follows:

"Q. What happened back at Santa Rosa regarding this transaction?"

Counsel for the defendant Blumenthal objected to the question as hearsay and not binding upon the defendant Blumenthal. The Court overruled the objection, to which ruling counsel for the defendant Blumenthal Excepted.

(The Witness Continuing): "We just left there and Minkler went back to his own place of business, and I went back to mine, and about two or three days after he called up and says that the whiskey is on its way."

Counsel for the defendant Blumenthal objected to this evidence and to anything that happened between Minkler and the witness. The Court overruled the objection, to which counsel for the defendant Blumenthal duly Excepted.

(The Witness Continuing): "I received a phone call from Minkler. He said, 'The whiskey will be up in a few days'. About Friday the whiskey arrived, 100 cases, by Sonoma-Marin Freight Company. That is my signature on the check for

\$2,450 shown me. I wrote [79] the check out and delivered it to the name on there, Clyde Minkler. I wrote the check for \$2,400 at the instructions of Clyde Minkler."

XXII.

That the said District Court erred in granting the motion of the United States Attorney to strike out certain testimony given on cross-examination by the witness Travis, to which ruling counsel for the defendant Blumenthal duly Excepted:

Q. But the truth is, you have never been indicted in this conspiracy that you were also in.

A. No.

Mr. Colvin: I ask that that be stricken.

Mr. Riordan: Well, it goes to the weight and credibility, and to the interest, bias and prejudice as to why he might be testifying.

Mr. Colvin: It is an assumption of counsel that the witness was in the conspiracy."

The Court granted the motion to strike said testimony, to which motion, counsel for the defendant Blumenthal duly Excepted.

XXIII.

The said District Court erred in denying the motion of counsel for the defendant Blumenthal to strike out the following testimony, given by the witness Harkins, upon the ground that it was hearsay, and not binding upon the said defendant, to which ruling counsel for the defendant Blumenthal duly Excepted: [80]

"Mr. Weiss stated that it was true that he re-

received half of the \$2.00 cash paid to the Francisco Distributing Company for clearing this whiskey through their books, and he finally refused to answer who actually owned the whiskey. He said that 'I don't want to involve myself'. Mr. Weiss said he knew Mr. Blumenthal. He said he knew Mr. Blumenthal, but he refused to stated to the best of my recollection, and positively, whether Mr. Blumenthal was the owner of the whiskey or not."

XXIV.

That the said District Court erred in overruling the objections to the admission of all the evidence and exhibits in the case against all the defendants, which said objections and motions and the specific grounds therefor were stated by Mr. Friedman, counsel for the defendant Feigenbaum, and were adopted by counsel for the defendant Blumenthal, which said objections and motions and the said rulings of the Court thereon from the record and proceedings herein fully and at large appear, and to which rulings of the Court thereon, counsel for the defendant Blumenthal duly Excepted.

XXV.

That the said District Court erred in denying the motion of counsel for the defendant Blumenthal for a directed verdict, which said motion and ruling of the Court thereon, and the exception of counsel for the defendant Blumenthal are in words and figures following, to-wit:

"Mr. Riordan: If your Honor please, I would like to adopt for the defendant Blumenthal the [81]

particular motions just made by Counsel Friedman and Counsel Dunne, substituting therefor also instead of the particular witnesses named with respect to extrajudicial statements the failure to establish the corpus delicti evidence to apply to the witnesses Lombardi, Fingerhut and Travis. I do that in that manner to save the time in repeating those motions and therefore I adopt all of the motions heretofore made. And I would like to for the defendant Blumenthal add the following motions:

In behalf of him, I make a motion for a directed verdict for the defendant Blumenthal on the grounds that the said indictment does not state facts sufficient to constitute a crime or offense against the United States of America.

Second, that the maximum Price Regulations 193 and 445, which the said indictment charges that this defendant, namely, Blumenthal, conspired to violate, are, and each of said Regulations is, so indefinite, uncertain, that it is impossible to determine what is meant thereby, or what acts are prohibited thereby, and in part it is impossible to ascertain what price it was lawful at the time mentioned in the said indictment to sell the whiskey referred to in the said indictment and by reason of which the said Regulations are void; that a conviction under the said indictment would be in violation to the Fifth Amendment of the United States in that no person shall be deprived of life, or property, without due process of law, and that this [82] Honorable Court, I say respectfully, has no jurisdic-

tion to hear this cause, or put the defendant to trial on the indictment.

Second, that the Regulation 445, which under its terms, at a date subsequent to the transactions involved in this indictment relative to Rocking Chair Whiskey, namely, the dates of December 1943 and January 1944, was not passed and in effect until May of 1944, and that it is an attempt upon the part of the Administrator and those adopting the regulation to create an ex post facto law.

I further want to make the point, if your Honor please, without arguing it, at least at this time, that the provisions under this special act, out of which these Regulations 193 and 445 are created, and the general Act itself, the so-called Office of Price Administration Act, has all of the elements in it that allow a transaction of this nature, and that no other Act or law of the United States, whether it be civil or criminal other than the exceptions contained in that Act, can be used.

I particularly call that to your Honor's attention because I intend to stand seriously by the point that under the general act there is a provision which sets forth that no violations of the Price Administration can be had by any parties by agreement or otherwise—I am using the general language in there—but an agreement is a conspiracy or a synonym. The lawmakers then go on to set up a structure between Federal officials who can be charged and convicted for a felony. All other persons in the United States [83] can only be convicted of a misdemeanor, and then the Act goes

on to provide in the third section that any act inconsistent with this general OPA Act shall have no force and effect. And, while normally, at first glance, that might seem very peculiar, that you could toll the famous Conspiracy Statute, the specialty acts of this nature for a period of time, the last twenty or thirty years at least, have been laying distinct lines of charges and punishment where they put teeth into those so-called Acts, and while it has never been before the higher Courts, at this time I raise that point very seriously before your Honor."

The Court: I will deny that motion, and you may have an Exception.

Mr. Riordan: Exception.

XXVI.

That for the reasons set forth by counsel for the defendant Blumenthal in the assignment next immediately preceding, the said District Court erred in denying the motion of counsel for the defendant Blumenthal at the conclusion of the entire case, and after both sides had rested for an instructed verdict of not guilty, to which ruling of the Court, counsel for the defendant Blumenthal duly Excepted.

XXVII.

That the indictment in the above entitled cause, for all and singular, the reasons set forth in the demurrer to said indictment and the motion to quash the said indictment, filed by the defendant Harry Blumenthal was a nullity, and the said D

trict Court had no jurisdiction to hear and determine the [84] said indictment, or to try the said defendant thereon, or to pass judgment upon the said defendant, and that all and singular, the proceedings aforesaid were and are, a nullity; that the evidence taken and had upon the trial of the above-entitled cause was, and is, insufficient as a matter of law, to establish the guilt of the defendant Harry Blumenthal of the purported offense attempted to be charged in the said indictment, or of any other crime or offense against the United States of America, or of any conspiracy to commit any crime against the United States of America, or to violate any Regulation or purported Regulation of the Price Administrator.

Wherefore, said defendant Harry Blumenthal prays that the aforesaid judgment and sentence of the said District Court be reversed, and that he go hence sine die.

Dated: July 17, 1945

(Signed) MORRIS OPPENHEIM

Attorney for defendant and appellant, Harry Blumenthal.

(Acknowledgment of Service.)

[Endorsed]: Filed July 20, 1945. [85]

[Title of Court and Cause.]

ASSIGNMENT OF ERRORS OF DEFENDANT
ALBERT FEIGENBAUM

Now Comes Albert Feigenbaum, one of the defendants, and appellants in the cause numbered and entitled as above, who has heretofore appealed to the United States Circuit Court of Appeals for the Ninth Circuit from the judgment and sentence given, made and entered against him in said cause in and by the said District Court, and having duly given his notice of appeal in the manner and form provided by law, and by the Rules adopted and promulgated by the Supreme Court of the United States governing appeals in criminal cases, files this, his assignment of the errors upon which he will rely for a reversal of the judgment and sentence aforesaid, and says, that in the record and proceedings aforesaid, as also in the judgment of the plea herein, manifest error hath happened to the grievous damage of him, the said Albert Feigenbaum, in each and every of the following particulars, to-wit:

I.

That the indictment on file in the above-entitled cause does not state facts sufficient to constitute any crime or offense against the United States of America.

II.

That the said indictment does not state facts sufficient to charge this defendant Albert Feigen-

baum with any crime or offense against the United States of America.

III.

That the said indictment does not state facts sufficient to charge this defendant Albert Feigenbaum, and does not charge this defendant with any crime or offense against the United States of America, or with any conspiracy to commit any crime or offense against the United States of America. [87]

IV.

That said District Court erred in granting the motion of counsel for the United States of America, made at the conclusion of the Government's case in chief, to admit all evidence which theretofore had been admitted against any defendant as against all defendants and to admit all documents, theretofore marked for identification in evidence against all the defendants, to which ruling of the said District Court counsel for this defendant Albert Feigenbaum duly Excepted.

V.

That the evidence in the case was and is insufficient to establish the offense alleged in the indictment as against the defendant Feigenbaum.

VI.

That the said District Court erred in denying the motion of said defendant Albert Feigenbaum for a new trial, to which ruling and order of the said

District Court counsel for this defendant Albert Feigenbaum duly Excepted.

VII.

That said District Court erred in denying the motion of said defendant Albert Feigenbaum in arrest of judgment, to which order and ruling of said District Court counsel for said defendant Albert Feigenbaum duly Excepted, said motion being made on the following grounds:

1. That said indictment does not state facts sufficient to constitute an offense under or against the laws of the United States.

2. That it appears from the record that judgment if made and entered would be unlawful.

3. That from the record it appears that the above entitled Court did not have jurisdiction over the offense sought to be alleged in the indictment.

4. That the indictment is not sufficient in form or substance to enable this defendant to plead the judgment in bar of another prosecution for the same offense.

VIII.

That the said District Court erred in admitting in evidence over the objection of counsel for the defendant Feigenbaum the following testimony of the witness Fred A. Sander:

"The Witness: I sent a bill for the services which my company rendered in this matter.

Q. To whom did you send the bill?"

Counsel for the defendant Feigenbaum objected to the question upon the ground that the same was self-serving. The Court overruled the objection, to which ruling counsel for the defendant Feigenbaum duly Excepted.

"The Witness: We sent our invoice to the Francisco Distributing Company".

IX.

That the said District Court erred in giving the following instruction to the jury during the course of the examination of the witness Joseph N. Nathanson:

"The Court: I will instruct the jury at the present time that pursuant to the authority given to him by statute, the Price Administrator, on May 22, 1943, promulgated an Order No. 5 in which he fixed the maximum prices for all sales by Ben Burke Inc., Foster & Company, and American Distilling Company, as follows: [89]

That on or after May 24, 1943, Ben Burke, Inc., Boston, Mass., Foster & Company, New York City, and American Distilling Company, Beacon, Illinois, may sell and deliver to any person, and any person may buy and receive from those sources, Old Mr. Boston Rocking Chair Whiskey, a blend of Straight Bourbon Whiskies, 80.6 Proof, aged as above, at the following prices: \$19.24—that is not in issue; that is another kind of whiskey?

Mr. Colvin: That is for pints.

The Court: \$15.37, plus \$3.87, being the amount of the increased Federal Excise Tax of November

1st, 1942, applicable thereto, or a total of \$19.24 per case of 12 bottles, each bottle containing one-fifth gallon of such whiskey.

Now, do you wish to take an exception to that?

Mr. Friedman: Yes, your Honor, I wish to object to what your Honor has told the jury, and I ask your Honor to instruct the jury to disregard anything you have just read from the Federal Register or advised them about, upon the following ground:

First: that the purported order is only an order that regulates processors of these particular distilled spirits. It has nothing to do with wholesalers. It has nothing to do with people who buy from wholesalers or jobbers—that is the portion you have instructed the jury about, and therefore this portion of the order is not binding upon Mr. Feigenbaum in this case, and who is neither a processor or a wholesaler of distilled spirits.

Secondly: upon the ground that the order on its face is in violation and in excess of the [90] power conferred by the Emergency Price Control Act for these reasons; that under the Price Control Act, the Administrator has the power by general order and by general order only, to fix the prices of any commodity within the particular area or region, and that he has not the power, and never was given the power by Congress to fix different prices for different people for the manufacture of the same kind of article, and this is an order applicable only to certain people.

The Court: Do you propose to follow this up.

with further regulations with respect to the prices fixed for sale to wholesalers?

Mr. Colvin: Yes, your Honor.

The Court: And this is preliminary to that?

Mr. Colvin: Yes, your Honor.

The Court: I will overrule the objection and an exception will be noted."

X.

That the said District Court erred during the examination of the Witness John Giometti in overruling the objection of said defendant Feigenbaum to the following question:

"Q. At that time did you give any cash to Norman Reinburg?" and in permitting the said witness to answer as follows:

"I gave him the balance of the \$65 a case."

:(To the Court): \$2,025."

The objection was made on the ground that such evidence was not binding on the defendant Feigenbaum. An exception was noted.

XI

That the said District Court erred in admitting the following evidence and in making the following rulings during the [91] examination of the witness Henry L. Taylor, over the objection of counsel for the said defendant Feigenbaum:

"The Witness: I had a conversation with Mr. Feigenbaum. That conversation took place at the drugstore which I mentioned. Besides Mr. Feigenbaum and myself, my wife and Mr. Humes were present, and there were two other parties there.

Q. What was that conversation regarding the purchase of whiskey?

Mr. Friedman: We object to that on the ground it is incompetent, irrelevant and immaterial, the corpus delicti has not been laid, and until the corpus delicti is established, any acts, declarations or statements of a defendant or an alleged co-conspirator are inadmissible.

The Court: I will overrule the objection. He is asking for the conversation as to the purchase of the liquor.

Mr. Friedman: Exception.

The Witness (Continuing): I don't recall what Mr. Feigenbaum said. I do not recall the exact words.

(To the Court) I bought some whiskey from this man. We went out there to buy this whiskey, and he told us how much it was. We gave him a \$500 deposit prior to that, and he said if we hadn't shown up, why, we would have lost that \$500. We went out into this man's place of business, and I had a talk with him. He said he would give us the whiskey. He did not tell me what kind of whiskey at that time. He told me the price would be \$64.00. We said we would take it. He wanted us to take 200 cases. So we finally thought we would take 200 cases. So we took 100 cases instead of the 200. At [92] the beginning of the conversation, I told Mr. Feigenbaum we would take 100 cases. He wanted us to take 200 cases. I told him we would if we could afford it. We finally made a deal for the 100 cases. He had us to make out a check to

the Francisco Distributing Co. for \$4900. That conversation took place on December 9 at the Sunset Drug Store on Mission Street, San Francisco, around 21st Street. A gentleman by the name of "Little Joe," and another fellow by the name of Tucker, were present beside Mr. Feigenbaum, Mr. Humes and myself. We were introduced to Mr. Feigenbaum, Mr. Humes, and myself. We were introduced to Mr. Feigenbaum, and he said it was lucky we came down, or we would have forfeited the \$500. We said we were anxious to come down and save our \$500, and we was anxious to get the whiskey. We told him we were from Cottonwood, Shasta County. Mr. Humes and myself were introduced to Mr. Feigenbaum by this man "Little Joe." He said he would get us the whiskey and the price was \$64, and he had us make him a check to the Francisco Distributing Company. That was per case for 100 cases. We told him we would take 200 if we could. If I couldn't, why he would take the 100; he would keep the other 100. He wanted to bill 200 cases against our license. He said he could take the other 100 if we didn't take it. He said he would run it in on our license. He had me make him out a check; that is, I had to go out and get my wife at the car, and she came in and made the check to Mr. Feigenbaum. I had left her at the car outside. Mr. Feigenbaum instructed my wife how to make the check out.

The check shown me, entitled, "R. M. and H. L. Taylor, Pay to the order of Francisco Distributing Company, \$4900," is the check my wife made out

at that time. It was written and signed by Mrs. Ruth Taylor in my presence. He instructed her [93] to make it to the Francisco Distributing Company for \$4900.

The said check was marked for identification as U. S. Exhibit 24.

The Witness: (Continuing) She made the check out for \$4900, and he had us give him \$1.050 in cash. I gave the money to Mr. Feigenbaum. We discussed the 200 cases and finally we took the 100 cases. It was finally said if we did not take the 200 cases he would take the other 100 cases. I do not think anything else was said at that time and place in that conversation."

XII.

That the said District Court erred during the examination of the said witness Henry L. Taylor in admitting the following testimony over the objections of counsel for the defendant Feigenbaum:

"I had a conversation with the man to whom I gave the check which took place on the street in front of this bar. Besides myself and Little Joe this man and Mr. Tucker were present. [94]

Q. What was the conversation?

Counsel for the defendant Feigenbaum objected upon the ground that the conversation was not binding upon the defendant Feigenbaum because it was conversation occurring out of his presence. The Court overruled the objection, to which ruling counsel for the defendant Feigenbaum then and there duly Excepted.

The Witness: In that conversation, Little Joe said he could get us some whiskey and we said we would take it. We said we would give him a deposit of \$500 and he would make a deal, getting us the whiskey. At that time he did not tell us what kind of whiskey it was. There was 100 cases mentioned at the time. We gave him the \$500 in the street and he agreed to get this whiskey in about a week's time. That was all of the conversation at that time and place."

XIII.

That the said District Court erred during the examination of the said witness Henry L. Taylor in admitting the following testimony over the objection of counsel for the defendant Feigenbaum:

"I had a conversation with Mr. Feigenbaum on that day at the Sunset Drug Store. My wife was not with me during that conversation. Only Mr. Feigenbaum and myself were present.

Q. What conversation did you have with Mr. Feigenbaum on that date regarding the whiskey?

Mr. Friedman: I will object to that on the ground it is incompetent, irrelevant and immaterial; the proper [95] foundation is not laid. We have no proof of the corpus delicti or for an act, statement or declaration of an alleged co-conspirator.

The Court: Objection overruled. Exception noted.

(The Witness Continuing): I had a conversation with him. I asked him, 'Where is our whiskey?' We were worried about it; we hadn't heard anything from this liquor so he told us it would be

in soon and it would be shipped to us. At that time he told us the name of the whiskey was the Old Rocking Chair, and he showed me a bottle he had in his desk drawer. That was a fifth. I did not open the bottle there. I asked him what kind of whiskey it was, and how good it was, and I made a deal with him to buy a case of whiskey to take down to Los Angeles with me. That was, in addition to the other purchases. I paid him \$64 for that case in cash. I told him I would take the 100 cases and he wrote a check out to me, and I endorsed it back to him. He wrote a check for \$2,450. He asked me to endorse that so that would put him in the clear.

(To the Court): They would give us instead of taking 200 cases which we were billed for the \$4,900. That would give us just the 100 cases for \$64 a case so he wrote the check for \$2,450 and had me endorse it back to him. He signed that check in my presence. I did not receive any cash for it when I endorsed it. I told him I had to be going; I was going to Los Angeles and we wanted to get our whiskey as quick as we could. We gave him the instructions previous to that. [96] I had no subsequent dealings with him."

XIV.

That the said District Court erred in admitting the following evidence and making the following rulings thereon during the examination of the witness Ruth Taylor over the objection and exception of counsel for the said defendant Feigenbaum:

"There was a discussion about writing the check.

Q. What was that discussion?"

Mr. Friedman objected to the question on the ground that it was incompetent, irrelevant against defendant Feigenbaum, and that it called for acts, declarations and transactions participated in and performed by defendant Feigenbaum when the substance of the offense charged had not yet been established.

The Court overruled the objection, to which ruling counsel for the defendant Feigenbaum duly excepted.

The Witness: Mr. Feigenbaum told me to make it out to the Francisco Distributing Company for \$4,900. I asked if we would get a receipt for it, and he said the check would answer as a receipt. I did not have any other transaction; I didn't hear any of the transactions of the persons present except I wrote out a check for that amount of money and he said the check would act as a receipt."

XV.

That the said District Court erred during the examination of the witness Raymond C. Humes, in admitting the following evidence over the objection of counsel for the defendant Feigenbaum, and in making the following rulings thereon: [97]

"Q. What was the conversation you had with Mr. Feigenbaum?"

Mr. Friedman objected to the question upon the ground that it called for the act, or declaration of payment (sic; or statement) on the part of an

alleged co-conspirator in the case and that there was no proof of the corpus delicti.

The court overruled the said objection, to which ruling counsel for defendant Feigenbaum duly Excepted.

"The Witness: We were introduced to Mr. Feigenbaum by Little Joe, and Mr. Feigenbaum wanted to know what we would have, and we told him we wanted 100 cases of whiskey. He said this, 'I think I can get it for you'. Nothing was said about the deposit right at that time. He said he would get us 100 cases of whiskey and he would have to have a check for it for \$24.50 per case. He said the whiskey altogether would cost us \$64 per case. It was then that I had the discussion about the \$500 I had paid. He said it was a good thing we got down on that date, or we would have forfeited the \$500. Mr. Feigenbaum said that. We had a conversation then about the number of cases we were going to take. We were talking about 100 and Feigenbaum wanted to know if we could take 200. I thought it was a little too steep for myself, and I said that. Then, Mr. Taylor and him and I got talking about how we could use the 200 so we were to make out the check for 200 cases, which was \$4,900. The check for \$4,900 was made out after our statement that maybe we could take 200. We asked him about the whiskey, if we could take the whiskey up on a truck with us to [98] Cottonwood. He said the whiskey wasn't in. He said it would be about a week or ten days; that the whiskey would come in on a car and that they

would send it up by truck. If not, we would receive it by freight. We asked him where the distributor was, and he didn't say. He asked 50c a case to pay for the freight. He was paid an amount of money for the freight in addition ~~to the 500~~ deposit and the check for \$4,900. He was paid the further amount of \$1,050. Mr. Taylor paid that money to Mr. Feigenbaum in my presence. Mr. Feigenbaum then said he wanted a check for \$24.50. He said that went to the distributor. He said we would have to come through with \$1,050 in cash. I think that is about all the discussion at that time."

XVI.

That the said District Court erred in admitting the following evidence during the examination of the witness Walter J. Vogel and in making the following rulings thereon:

"Q. Did you give any cash to this man in addition to this check?"

Counsel for the defendant Feigenbaum objected to the question upon the ground that no foundation for the asking thereof had been laid. The Court overruled the said objection to which ruling counsel for the defendant Feigenbaum then and there duly Excepted.

"The Witness: I did not give any cash at that time to this man. I gave him the check. After he brought me the bills I gave him the cash. He told me I would [99] have to pay him for getting the whiskey. I have seen this document entitled

"Francisco Distributing Company No. 10092". I received this document from that man about an hour and a half or two hours after I gave him the check. He came back with this. Both of these transactions took place on the same day which was December 6, 1943. When he came back about an hour and a half later, I am sure he was the man to whom I had given the check. I think I gave him \$3,400 in cash. I paid \$24.50 for the whiskey. That was for 100 cases.

(To the Court): I mean \$2,450, or \$24.50 a case for 100 cases."

XVII.

That the District Court erred in granting the motion of the Government, made at the conclusion of the Government's case, to admit as against the defendant Feigenbaum all of the evidence that had theretofore been admitted against one or more of Feigenbaum's co-defendants as more fully appears as follows, to wit:

Mr. Colvin: Your Honor, for the sake of the record, I take it that the record will show that the Government does offer all evidence which has been admitted against any defendant as against all the defendants, and that further, the Government now makes an offer of all documents marked for identification to be admitted against all the defendants.

The Court: I take it that is the motion to be argued.

Mr. Friedman: That is the way I understood the record.

Mr. Colvin: I further move that the documents, 1 to 14, inclusive, I believe, which have been admitted against individual defendants be admitted as against all.

Mr. Friedman: I understand that the motion, concretely, of the Government at this time is that all testimony and all documents, irrespective of how they came into the record up to this time, be now admitted against all defendants. [100]

Mr. Colvin: That is the motion.

The defendant Feigenbaum objected generally and specifically to the admission of such evidence including the exhibits and documents which objection and objections were overruled by the Court and to which ruling and rulings said defendant Feigenbaum duly excepted as more fully appears from the record as follows, to wit:

Sub-Assignment, A

We object to the admission in evidence against the defendant Feigenbaum of the testimony of Sander as to any conversations he had with Weiss upon two grounds: [101] First, that part of that conversation and alleged utterances by Weiss were narrative of past events, and upon the second ground that they are declarations of an alleged co-conspirator made out of the presence of Feigenbaum, that they are hearsay, that the corpus delicti of the conspiracy has not been established, and that there is no evidence to show that Feigenbaum was a member of that conspiracy, and therefore the statements, acts and declarations of a co-conspirator

made out of his presence cannot be admitted in evidence against him for any purpose.

Sub-Assignment B

The defendant Feigenbaum objects to the admission in evidence against him of any of the testimony given by the witness Giometti on the ground that it is hearsay, that it calls for acts and declarations of third parties out of the presence of the defendant Feigenbaum and even the acts and declarations of people that Feigenbaum never even knew or heard of, given at another time, and upon the further ground that the corpus delicti has not been established, and that therefore these matters cannot be competent evidence against Feigenbaum. And during the course of Mr. Giometti's testimony there was introduced for identification Government's Exhibit No. 24, which was an invoice, and Government's Exhibit No. 25, which, I think, was a freight bill, or waybill, of some kind or other. And we object to the admission of Government's Exhibits 24 and 25 in evidence against the defendant Feigenbaum on the ground that they are hearsay, proof of the conspiracy has not been established, that the connection of the defendant Feigenbaum with [102] such conspiracy has not been established at all.

Sub-Assignment C

First having objected in general to all the testi-

mony of Giometti, we now object to this specific portion of Giometti's testimony going into evidence against the defendant here upon the ground that it is incompetent, irrelevant and immaterial, that the corpus delicti of the offense has not been established, and it calls for acts and declarations between third persons made out of the presence of the defendant Feigenbaum, and there is no proof he was a member of any conspiracy, or that he authorized, had knowledge of, or ratified any such conversation or acts on the part of Abel.

Sub-Assignment D

So far as the testimony of Mr. Reinburg is concerned we object to the admisison in evidence against the defendant Feigenbaum of the testimony given by Mr. Reinburg upon the ground it is hearsay, upon the ground it calls for acts, transactions and events occurring out of the presence of the defendant Feigenbaum, that the corpus delicti of the offense has not been established, and there has been no evidence tending to establish the connection of Feigenbaum with any conspiracy charged or contained in the indictment filed herein, and that the testimony of Mr. Reinburg, so far as any acts, transactions or events he had with the defendant Abel are concerned, that the acts and statements and declarations of the defendant Abel are not binding upon the defendant Feigenbaum for the reasons I have stated.

Sub-Assignment E

During the examination of Mr. Reinburg there was offered for identification Government's Exhibits 22, 23, 34, and 35, 22 and 23 being bills and invoices, 34 and [103] 35 being checks, and we object to the admission of each of these exhibits in evidence as against the defendant Feigenbaum for each and all of the reasons that we have urged against the admission of the testimony of the defendant Reinburg and the testimony of the defendant Giometti, and upon the further ground that the proper foundation for none of these four documents has been established, and that there was no proof, first, as to the bills and invoices, that they were issued by the Francisco Distributing Company, and secondly, there was no proof that the checks written and given by Giometti and by Reinburg were ever received by the Francisco Distributing Company, or cashed by them. Again I confine, of course, the evidence as it appears against the defendant Feigenbaum.

Sub-Assignment F

I object to the admission in evidence against Feigenbaum of any testimony given by the witness Figone on all the grounds I have heretofore urged as to the admission of some of the testimony, that it is hearsay, that the corpus delicti of the charge has not been established; there is no independent evidence to show that there was a conspiracy, or that Feigenbaum was a member thereof, other than

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testimony as to the acts and declarations of alleged co-conspirators; that the testimony as to all those transactions and events occurring out of the presence of the defendant Feigenbaum, they are not binding on him, there being no proof he authorized, sanctioned, or even had knowledge of such transactions. [104]

Sub-Assignment G

“Mr. Friedman: I think this morning I objected to the Reinburg and Giometti testimony, to the Figone and the Avila testimony, as I recall it, and Exhibits Nos. 26 and 27, the check and invoice that were admitted on Figone's testimony. As to Figone, Avila, and these two exhibits, of course, Feigenbaum objects to their admission in evidence against him on all the grounds previously stated, and on the ground they are hearsay as to him; no foundation has been laid for the check or invoice establishing who actually received and deposited the check or who made the invoice; and that the corpus delicti has not been established, there being no proof that Feigenbaum was a member of any conspiracy, and there being no proof of any conspiracy, at all.

Sub-Assignment H

As to the witness James Cermusco, upon whose testimony there were marked for identification Exhibits [105] 27, 28, 29, 30, 31, 32 and 33, I object to the introduction against the defendant Feigenbaum of Cermusco's testimony on the ground it is

hearsay, the corpus delicti has not been established, it calls for acts, declarations and events by a third person out of the presence of Feigenbaum. It is not binding upon him, and I object to the admission in evidence of Exhibits 28 to 33, inclusive, upon the same grounds, and likewise upon the ground that no foundation has been laid for such checks, in that there was no proof as to who received or cashed them. There is no proof as to who issued the invoices.

Sub-Assignment I

Upon the same grounds I move to strike out the testimony of Vukota and Lewis on the ground it is hearsay twice removed. These men, the testimony shows, dealt only with Cermusco. They never saw anybody named as a defendant in this case and, as I recall it, anybody connected with the Francisco Company. Their acts, statements and declarations are hearsay as to Feigenbaum, acts and declarations out of his presence, over which he had no control; the corpus delicti of the offense charged has not been established, and that there has been no independent proof identifying Feigenbaum with the conspiracy charged.

Sub-Assignment J

The next set of witnesses—and I can deal with them jointly—are Henry L. Taylor, Ruth Taylor and Raymond C. Humes. This testimony was admitted as to Feigenbaum and at this time I am going to move to strike it out on the following grounds, to-wit, that such testimony of these three witnesses, all dealing with the same event, is en-

tirely immaterial and incompetent, for the [106] reason that the corpus delicti of the offense has not been established, and upon the further ground that all this showing was an independent, isolated transaction wherein Mr. Feigenbaum agreed to act as the agent for Mr. Taylor and Mr. Humes for the purchase for these people of 200 cases of whiskey, and that that was the agreement between the parties, and there was no agreement between Feigenbaum and either Taylor or Humes, or both of them, that Feigenbaum was to sell to either of these parties any whiskey.

Sub-Assignment K

On like grounds I move to strike out U. S. Exhibit 34, the check for \$4,900 testified to as having been written by Mrs. Taylor and delivered to Feigenbaum; and United States Exhibit No. 35, the invoice that was involved in that transaction.

Sub-Assignment L

I object to the admission in evidence of the testimony of Walter G. Vogel, together with U. S. Exhibits 45 and 46, which were introduced and marked for identification upon his examination. You will recall that Vogel testified that some strange and unidentified man came into his place and offered to sell him whiskey at \$24.50 per case for the Distributing Company demanding a brokerage for all over that amount. There is absolutely no evidence that this man, Vogel knew anybody connected with the charge in this indictment whatso-

ever, and Vogel's testimony relates to an incident — clearly *res inter alios acta*, hearsay as to the defendant Feigenbaum, the proof of the *corpus delicti* of the offense has not been established and it calls for acts and transactions out of the presence of Feigenbaum, without any evidence to show that he knew, sanctioned approved or ratified or authorized such transaction, [107] and that goes to the two exhibits 45 to 46, as well as to Vogel's testimony.

Sub-Assignment M

I likewise object to the introduction in evidence against Feigenbaum of the testimony of Francis Duffy, together with United States Exhibits 47, 48 and 49, consisting of two checks and an invoice that were marked for identification upon Duffy's examination. The testimony shows that Duffy, who operated a tavern — a man came in, whom he couldn't identify, as I recall it; that he bought from this man 100 cases of whiskey at \$24.50 and paid the man a premium of \$20 a case, gave him a check for \$2,000, a check for \$2,450. The invoice came in, the name of the payee on this check was left in blank, filled in by the man after he went away. The testimony of Duffy is wholly incompetent, absolutely hearsay, *res inter alios acta*, calls for transactions and events out of the presence of the witness Feigenbaum which he is not shown to have sanctioned, ratified or confirmed, authorized, or approved in any way; that the *corpus delicti* of the charge of the indictment has not been established, or any evidence to show that he was a member of any conspiracy.

Sub-Assignment N

I object to the introduction in evidence of the testimony of Angelo Lombardi; together with U. S. Exhibits 50 and 51, which consist of a check written by Lombardi to a man named Minkler and an invoice. Lombardi testified that in Santa Rosa he bought 100 cases and gave some cash to Mr. Blumenthal for it. Minkler contacted him about the whiskey. He went to San Francisco and talked to some man there, and so forth. That later on, on the 20th. of December, he came to the Sportorium [108] with Minkler. He went into a back room and paid Blumenthal some money. I will object to this testimony the check, and the invoice, upon the grounds I have heretofore stated, that the matter is purely *res inter alios acta*, is not binding on the defendant Feigenbaum, calls for acts, transactions and events out of his presence, over which he has no control, and they are not binding on him; the *corpus delicti* has not been established, and in this case, as in the others, it calls for the acts and declarations of a co-conspirator made out of the presence of Mr. Feigenbaum, and it is inadmissible, as these other matters are inadmissible for any purpose until the *corpus delicti* has been established by independent testimony. On the same grounds, I object to the introduction in evidence of the testimony given by Herman Fingerhut together with exhibits 53, 54, 55, 56 and 57, introduced upon his examination. Fingerhut owned a cafe in Vallejo. He said on December 3rd and 4th he saw Blumenthal, bought 200 cases of whiskey at \$55; that later he

and Mr. Travis went to the Sportorium and had another deal with Blumenthal.

Sub-Assignment O

I object to the testimony of this witness upon all the grounds I have heretofore stated. It calls for the declaration and conduct of an alleged co-conspirator, Blumenthal, out of the presence of the defendant Feigenbaum, and without any independent proof of the corpus delicti or of Feigenbaum's connection with the alleged conspiracy; upon the further ground it is hearsay, not binding on the defendant Feigenbaum; it constitutes acts that were done without his knowledge, consent, ratification or approval. [109]

Sub-Assignment P

I object to the introduction in evidence of the testimony of Walter Travis, together with Government's Exhibits 58, 59 and 60, consisting of two invoices and a freight bill. The testimony of Walter Travis was the same as that of Fingerhut except that in the first deal Fingerhut took 100 and Travis took 100, and in the second hundred, 75 were for Travis and 25 for Fingerhut.

I object to the introduction of this testimony and the three exhibits I have designated, upon all the grounds I have objected to the testimony of Fingerhut and the checks and invoices involved in Fingerhut's testimony.

Sub-Assignment Q

I object to the testimony as against the defendant Feigenbaum, of the testimony given by the witness A. P. Jones. Mr. Jones, as I recall, testified to certain Alcohol Tax Unit forms 52-A and 52-B, which were marked Government's Exhibit No. 2 and Government's Exhibit No. 3, and Government's Exhibits 4, 5 and 6. These forms were introduced for the purpose of showing the purchase or lack of purchase of certain whiskey by the Francisco Distributing Company during certain months. I object to those forms being in evidence against Feigenbaum, on the ground they are res inter alios acts. They constitute hearsay as to him. No proper foundation has been laid as to any of these forms, and there is no proof they were executed by any alleged conspirator in this case; that they are hearsay as to Feigenbaum, and that they cannot be considered for any purpose in determining his guilt or innocence.

Sub-Assignment R

I object to the introduction in evidence against Feigenbaum of the testimony given by the witness Robert [110] Grubbs. Robert Grubbs was connected in some way with Santa Fe Railway, and he testified to Government's Exhibits 7 and 8, and I object to the introduction of such exhibits in evidence, consisting of two freight bills for two carloads of whiskey, on the ground the matter is purely hearsay as to the defendant Feigenbaum. They are acts, transactions and events out of his knowledge, pres-

ence or hearing. It is not shown he knew of, ratified, confirmed, authorized or approved, and these matters are wholly incompetent to be considered in determining the guilt or innocence of the defendant Feigenbaum.

Sub-Assignment S

I likewise move to strike out the testimony of Fred A. Sander, or rather, I object to the admission of the testimony of Fred A. Sander in evidence against the defendant Feigenbaum, together with United States Exhibits 9, 10, 11 and 12, which were introduced and marked upon the examination of this witness; upon the ground that the testimony of Mr. Sander, who was connected with the San Francisco Warehouse and executed two warehouse receipts, and testified as to certain instructions as to the disposal of the contents of the cars which he said were represented by those receipts supposed to have been given to him by the defendant Weiss. I object to all the testimony and all these exhibits I have enumerated, upon the grounds that as to the defendant Feigenbaum it is wholly incompetent, irrelevant and immaterial and hearsay as to him, not binding upon him; that there has been no proof of the *corpus delicti* or the defendant's connection with any conspiracy, or the conspiracy set forth in the indictment. [111] These matters are merely *res inter alios acta*, and I object to their admission. Additionally, I object to the admission of that portion of Mr. Sander's testimony which has to do with conversations he said he had with the defendant Weiss, on December 15th and December 17th,

relative to delivery orders, invoices, and what was to be done with these two cars of whiskey; upon the grounds that that evidence constitutes the acts, declarations and statements of an alleged co-conspirator, made out of the presence of the defendant Feigenbaum, and there being no proof of the corpus delicti, the same as that binding on the defendant Feigenbaum.

Sub-Assignment T

I likewise object to the introduction in evidence against the defendant Feigenbaum of United States Exhibits 13 and 14, which have to do with certain invoices of a carload of whiskey out of a B & O Railroad car, upon all the grounds I have objected to the other portions of the admission of the other railway receipts and instructions, as testified to by Sander under the prior exhibits; and additionally, I object to the admission against Feigenbaum of the testimony of the witness Sander relative to a conversation he said that he had with Weiss on January 3, 1944, in which the invoices were received by Weiss, and in which Weiss told him to do something about the delivery on the ground that the testimony as to the acts and declarations of an alleged co-conspirator is inadmissible and not binding upon Feigenbaum, and there has been no independent proof of the corpus delicti of the offense, or Feigenbaum's connection with any alleged conspiracy. [112]

Sub-Assignment U

I object to the admission in evidence against the defendant Feigenbaum of the testimony of the witness Frank Dito, of the Bank of America, and likewise the admission in evidence against the defendant Feigenbaum of United States Exhibits 16, 17, 18, 36, 37, 38, 39, 40, 41, 42, 43, 44 and 45. I object to all these matters in the testimony of Dito upon the ground they all have to do with the bank account and the affairs of the Francisco Distributing Company. They are matters and things of which the defendant Feigenbaum is not shown to have had any knowledge, any control over, acts and things done out of his presence, hearsay as to him, and that in every instance no foundation has been laid for the introduction of any of these documents, checks or statements that were introduced under Dito's testimony, for the reason that there has been no preliminary proof as to the endorsers or depositors, and so forth, of the account. And that includes the so-called signature cards, which is supposed to have been the one with which the account was opened for the Francisco Distributing Company in the name of Goldsmith and Weiss. I object to that, which is Government's No. 15, particularly upon all the grounds I have heretofore stated in discussing the exhibits admitted under the testimony of Frank Dito, and upon the further ground that no foundation for the signature card has been presented so far as the defendant Feigenbaum is concerned, and there is no proof that either Goldsmith or Weiss signed or executed the same.

Sub-Assignment V

I move that there be excluded, and if it has been admitted, that there be stricken out, so far [113] as the defendant Feigenbaum is concerned, and there is no proof that either Goldsmith or Weiss signed or executed the same.

Sub-Assignment W

I move that there be excluded, and if it has been admitted, that there be stricken out, so far as the testimony of the witness Joseph Nathanson is concerned, any computation of the figures he has given of the so-called ceiling price under the Emergency Price Control Act of whiskey is concerned, on the ground, it is not the subject of expert testimony I think I have covered them all.

The Court: The various motions to strike will be denied and exceptions noted. The court will adhere to its ruling that the evidence and the exhibits will be admitted against all the defendants, save in the case of the testimony of the last witness, Mr. Harkins, whose testimony will be admitted as it relates to conversations with the defendant Goldsmith as to him, and with respect to conversations with the defendant Weiss as to him, Mr. Weiss, and with respect to both of them, where the conversations were had with both of them.

Mr. Friedman: Our exceptions to each ruling are noted. (Emphasis supplied)

XVIII.

That the said District Court erred in denying the

motion of counsel for the defendant Feigenbaum to strike from the record the testimony of the witnesses James Cermusco, John Vukota and V. M. Lewis, insofar as the defendant Feigenbaum was concerned, to which ruling of the Court counsel for the said defendant Feigenbaum duly excepted. [114]

All as more fully appears from the record as follows:

Mr. Friedman: I will likewise on the same grounds and for the same reasons move that the testimony of witness James Cermusco, John Vukota and V. M. Lewis be stricken, so far as the defendant Feigenbaum is concerned, upon all the grounds urged against the admission of such testimony, and upon the further ground that the testimony of these three witnesses merely concern the extrajudicial statements and acts of an alleged co-conspirator, said and done out of the presence of the defendant Feigenbaum, and without any proof of his authorization, knowledge or consent, together with Government's Exhibit 28, 29, 30, 31, 32 and 33, introduced under such testimony.

The Court: The motion will be denied and exceptions noted for all defendants. [115]

XIX

That the said District Court erred in denying the motion of counsel for the defendant Feigenbaum to strike out the testimony of Walter Vogel and U. S. Exhibits 45 and 46 upon the grounds theretofore urged to the admission of such testimony and upon the further ground that the said testimony related

to an extrajudicial act and declaration of a co-conspirator said and done out of the presence of the defendant and without any proof of his authorization, knowledge, or consent thereto, to which ruling of the Court counsel for the defendant Feigenbaum duly excepted.

XX.

That the said District Court erred in denying the motion of counsel for the said defendant Feigenbaum to strike out the testimony of the witness Francis Duffy and Government's Exhibits 47, 48 and 49 upon the grounds theretofore urged for striking out the testimony and exhibits given under the testimony of Walter Vogel; to which ruling of the court counsel for the defendant Feigenbaum duly excepted.

XXI.

That the said District Court erred in denying the motion of counsel for the defendant Feigenbaum to instruct and direct the jury to find and return a verdict finding the defendant Feigenbaum not guilty, upon each of the following grounds, to-wit:

“1. That the evidence introduced by the Government is insufficient to support either a verdict or a judgment of guilty as to the defendant Feigenbaum.

2. That the offense sought to be charged in the indictment has not been proved by the Government;

3. That the evidence adduced fails and is [116] insufficient to prove the alleged conspiracy set forth in the indictment;

4. That the evidence adduced fails and is insufficient to prove that the defendant Feigenbaum was a member of identified with the conspiracy sought to be changed in the indictment.

5. That the evidence adduced by the Government does not exclude every other hypothesis except that of guilt, so far as the defendant Feigenbaum is concerned, and that such evidence is as consistent with his innocence as it is with his guilt.

6. That the only evidence tending to establish the conspiracy charged and Feigenbaum's connection therewith consists of extrajudicial acts and declarations of alleged co-conspirators, said acts and declarations of alleged co-conspirators having been done and made out of the presence and without the knowledge, authorization or consent of the defendant Feigenbaum."

to which ruling of the Court counsel for the defendant Feigenbaum duly excepted.

XXII.

The Court agreed in instructing the jury as follows:

"In every crime, there must exist a union or joint operation of act and intent and, on conviction both elements must be proved to a moral certainty and beyond a reasonable doubt. Such intent is merely the purpose or willingness to commit such an act; it does not require any knowledge that such act is a violation of the law. However, a person is presumed to intend to do all that which he voluntarily and wil-

fully does in fact do, and must also be presumed to intend all the natural, probable and usual consequences of all his own acts." [117]

The defendant Feigenbaum objected and noted an exception to the foregoing portion of the charge on the ground "that the crime of conspiracy involves a specific intent, and the presumption of intention as embodied in the court's instruction does not apply."

XXIII.

The Court erred in instructing the jury as follows:

"In the course of a trial, as in this case, which has run a number of days, and several hundred pages of transcript, as I understand, you may find some discrepancies or inconsistencies in the testimony of different witnesses. If such discrepancies or inconsistencies are not material and they do not affect the true issues of this case, and if they do not reasonably bear upon the guilt or innocence of the defendants, or any of them, do not waste your time in considering them."

The defendant Feigenbaum objected and noted an exception to the foregoing portion of the court's charge upon the ground that "the jury have a right to consider even inconsequential inconsistencies in determining the credibility of a witness."

XXIV.

That the said District Court erred in giving the following instruction to the jury:

"To constitute a conspiracy, it is not necessary

that two or more persons should enter into an express agreement for the unlawful venture or scheme, or that they should directly state between themselves or otherwise what the unlawful plan or scheme is to be, or the details thereof, or the means by which the unlawful combination [118] is to be made effective. It is sufficient if two or more persons, in any manner, positively or tacitly come to a mutual understanding to accomplish an unlawful design. In other words, when an unlawful end is sought to be effected and two or more persons, actuated by the common purpose of accomplishing that end work together in any way, in furtherance of the unlawful scheme, every one of such persons becomes a member of the conspiracy. The success or failure of the conspiracy is immaterial but before a defendant may be found guilty of the charge, it must appear beyond a reasonable doubt that a conspiracy was formed, as alleged in the indictment, and that the defendant was an active party thereto."

to which instruction counsel for the defendant Feigenbaum duly excepted.

XXV.

That the said District Court erred in refusing to give to the jury defendant Feigenbaum's requested instruction number 3, which was, and is, in words and figures following, to-wit:

"The indictment in this case charges the defendant Feigenbaum with having conspired with Louis Abel, Lawrence B. Goldsmith, Samuel S. Weiss and Harry Blumenthal, to unlawfully sell, at wholesale,

certain Old Mister Boston Rocking Chair Whiskey in excess of and higher than the maximum price established by law. If you find from the evidence that the defendant Feigenbaum merely purchased or agreed to purchase certain cases of Old Mister Boston Rocking Chair Whiskey from any other defendant in this case or that the defendant [119] Feigenbaum merely acted as the servant or agent or for or on behalf of one L. H. Taylor and/or one R. C. Humes for the purpose of purchasing for them certain Old Mister Boston Rocking Chair Whiskey from one or more of the other defendants in this case, and if you further find that the said defendant Feigenbaum was not acting as the servant, agent or employee of any other defendant named in this case, for the purpose of selling said whiskey, then you must return a verdict herein finding the defendant not guilty."

to which refusal of the Court, counsel for the defendant Feigenbaum duly excepted.

XXVI.

That the said District Court erred in refusing to give to the jury defendant Feigenbaum's requested instruction No. 4, which was and is, in the words and figures following, to-wit:

"Before you can find any defendant guilty in this case, it is necessary that the prosecution establish to a moral certainty and beyond a reasonable doubt that the conspiracy set forth in the indictment existed and that any such defendant was a member of that certain conspiracy. The conspiracy relied on by

the Government in this case is one wherein the defendant Lawrence G. Goldsmith, doing business as the Franciscan Distributing Company, was the owner and seller of the Old Mister Boston Rocking Chair Whiskey described in the indictment and that the defendants in case did conspire with each other to sell the particular Old Mr. Boston Rocking Chair Whiskey that was acquired and [120] owned by the defendant Lawrence B. Goldsmith. If you find that the defendant Feigenbaum in this case may have agreed with some person other than the defendants in this case to sell to such person cases of Old Mister Boston Rocking Chair Whiskey and that the said Feigenbaum, in order to make said sale to said third person, did buy from one of the defendants in this case, cases of such whiskey, and you do not find anything more on behalf of the defendant Feigenbaum, you must return a verdict herein finding the defendant Feigenbaum not guilty for the reason that he never became a member of the conspiracy charged in the indictment relief on by the Government, even though you should find that the sale of such whiskey by Feigenbaum to such third person was in excess of the maximum price established by law for such sale."

to which refusal, of the Court, counsel for the defendant Feigenbaum duly excepted.

XXVII.

That the said District Court erred in refusing to give to the jury defendant Feigenbaum's requested

instruction No. 5, which was and is, in the words and figures following, to-wit:

"If you find from the evidence in this case that the acts and conduct of the defendant Albert Feigenbaum amounted to no more than an action on his part to purchase, either for himself or for some other person, Old Mister Boston Rocking Chair Whiskey, and that he did so purchase said whiskey, then you must find that the defendant Feigenbaum was not a member of the conspiracy set forth and charged in the indictment and you must [121] return a verdict herein finding the defendant Feigenbaum not guilty."

to which refusal of the Court, counsel for the defendant Feigenbaum duly excepted.

XXVIII.

That the said District Court erred in refusing to give to the jury defendant Feigenbaum's requested instruction No. 6, which was, and is, in words and figures following, to-wit:

"I instruct you that where a transaction consists on the one hand of the selling of an article, that is either prohibited by law or that is being sold in a manner that violates the law, and on the other hand by the purchase of such article by another person, then, under such circumstances, the buyer and the seller are not guilty of a conspiracy to sell such article. Therefore, if you find from the facts in this case that the transaction involved amounted on the one hand to some of the defendants, other

than Feigenbaum agreeing to sell the whiskey described in the indictment at a price prohibited by law, and on the other hand that the defendant Feigenbaum merely agreed to purchase for himself or for some other person, some of the said whiskey at said price, then you must find that the defendant Feigenbaum was not a member of any conspiracy that had for its object the selling of said whiskey, he being merely a purchaser or agent for the purchaser thereof. Under such circumstances you must return a verdict finding the defendant Feigenbaum not guilty." [122]

to which refusal of the Court, counsel for the defendant Feigenbaum duly Excepted.

XXIX.

That the said District Court erred in refusing to give to the jury defendant Feigenbaum's requested instruction No. 7 which was, and is, in words and figures following, to-wit:

"If you find from the evidence in this case that the defendant Feigenbaum did agree with a man named H. L. Taylor and/or with a man named R. C. Humes to sell to either or both of such persons certain Old Mister Boston Rocking Chair Whiskey at a price in excess of the maximum price established by law, but if you also find that the defendant Feigenbaum had not agreed with any other defendant in this case to sell any Old Mister Boston Rocking Chair Whiskey at a price above that provided by law, then you must return a verdict herein finding the defendant Feigenbaum not guilty on

the ground that he was not a member of the conspiracy charged in the indictment."

to which refusal of the Court, counsel for the defendant Feigenbaum duly Excepted.

XXX.

That the said District Court erred in refusing to give to the jury defendant Feigenbaum's requested instruction No. 8, which was, and is, in words and figures following, to-wit:

"I instruct you that the defendant Albert Feigenbaum is not on trial for conspiring or agreeing with H. L. Taylor or R. C. Humes to sell to said R. L. Taylor or R. C. Humes, Old Mr. Boston Rocking Chair Whiskey at a price in excess of the maximum price established by law. [123] If the evidence in this case only establishes or tends to establish that the defendant Feigenbaum only conspired and agreed with H. L. Taylor and R. C. Humes to sell said whiskey, at a price in excess of the maximum price established by law, you must return a verdict finding the defendant Feigenbaum not guilty as that would not be the conspiracy charged in the indictment and for which the defendant Feigenbaum is on trial."

to which refusal of the Court, counsel for the defendant Feigenbaum duly Excepted.

XXXI.

That the said District Court erred in refusing to give to the jury defendant Feigenbaum's requested instruction No. 20, which was, and is, in words following, to-wit:

"Where an act may be attributed to a criminal or an innocent cause, it is the duty of the jury to attribute the act to the innocent cause rather than to the criminal one. A crime is never presumed where the conditions may be explained upon an innocent hypothesis. It is the duty of the jury, to reconcile, if possible, all circumstances shown in evidence with the innocence of each defendant and to account for all facts, if possible, upon the hypothesis that the defendant is not guilty."

to which refusal of the Court, counsel for the defendant Feigenbaum duly Excepted.

XXXII.

That the said District Court erred in refusing to give to the jury defendant Feigenbaum's requested instruction No. 22 [124] which was, and is, in words following, to-wit:

"When independent facts and circumstances are relied upon to establish, by circumstantial evidence, the guilt of a defendant, each material, independent fact or circumstance in the chain of facts relied upon must each be established to a moral certainty and beyond a reasonable doubt. If in the chain of facts or circumstantial evidence any one or more of the material facts in such chain are not established to a moral certainty and beyond a reasonable doubt, the entire proof fails and a verdict of not guilty must be returned."

to which refusal of the court, Counsel for the defendant Feigenbaum duly Excepted.

XXXIII.

That the said District Court erred in refusing to give to the jury defendant Feigenbaum's requested instruction No. 26, which was, and is, in words following, to-wit:

"The evidence in this case on which the prosecution relies is circumstantial evidence. Where the evidence relied on for a conviction is circumstantial such evidence must be not only consistent with the hypothesis of guilt, but inconsistent with any other rational hypothesis. Therefore, if you find in this case that the evidence leads to two opposing and rational conclusions, one that the defendant Feigenbaum is guilty and the other that the defendant is not guilty, it is your duty to adopt the conclusion that the defendant is not guilty and return a verdict finding the defendant Feigenbaum not guilty." [125]

to which refusal of the court, counsel for the defendant Feigenbaum duly Excepted.

XXXIV.

That the said District Court erred in refusing to give to the jury defendant Feigenbaum's requested instruction No. 27, which was, and is, in words following, to-wit:

In order for you to find the defendant Albert Feigenbaum guilty of the crime of conspiracy as charged in the indictment it is necessary that you find, among other things, to a moral certainty and beyond a reasonable doubt that a conspiracy existed between at least two persons to do the things

set forth in the indictment and that Albert Feigenbaum was a member of such conspiracy. In determining whether such conspiracy existed and that Feigenbaum was a member of such conspiracy you cannot take into consideration and must disregard all testimony and evidence relating to the acts and declarations of any alleged conspirator, other than the defendant Feigenbaum, said or done out of the presence of the defendant Feigenbaum. The existence of the conspiracy charged and Feigenbaum's connection therewith must be established by evidence independently of the acts and declarations of any alleged co-conspirator of Feigenbaum's said or done out of the presence of the defendant Feigenbaum."

to which refusal of the court, counsel for the defendant Feigenbaum duly Excepted.

XXXV.

That the said District Court erred in refusing to give to the jury defendant Feigenbaum's requested instruction No. 28, which was, and is, in words following, to-wit: [126]

"In determining whether a conspiracy existed, as charged in the indictment, and that the defendant Feigenbaum was a member of such conspiracy, I instruct you that you cannot consider testimony of the acts or declarations of any other person, charged in the indictment with being a co-conspirator with Feigenbaum, where such acts or declarations were done or made out of the presence of defendant Feigenbaum."

to which refusal of the Court, counsel for the defendant Feigenbaum duly Excepted.

XXXVI.

That the said District Court erred in refusing to give to the jury defendant Feigenbaum's requested instruction No. 29 which was, and is, in words following, to-wit:

"In determining whether the conspiracy charged in the indictment existed and that Albert Feigenbaum was a member of such conspiracy you must reject and disregard all evidence and testimony in the case relating to anything said or done, out of the presence of defendant Feigenbaum, by the defendants Goldsmith, Blumenthal, Weiss and Abel."

to which refusal of the court, counsel for the defendant Feigenbaum duly Excepted.

XXXVII.

That the indictment in the cause entitled as above, was, and is, null and void, and the verdict, judgment, and sentence entered thereon were likewise, severally, null and void, for the reason that the Maximum Price Regulations named and [127] mentioned therein, were and are, severally, void for uncertainty, for the reason that the same are couched in language so vague, uncertain, and indefinite, that it was, and is, impossible for a person of common understanding to ascertain what act or acts might lawfully be done thereunder, and what act or acts are prohibited thereby; and that by reason thereof, the conviction of this defendant, upon

said indictment which charges a conspiracy to violate each of the said regulations, was, is, and constitutes, a deprivation of liberty without due process of law within the meaning of the Fifth Amendment to the Constitution of the United States.

Wherefore, this defendant and appellant Albert Feigenbaum prays that the said judgment of the said District Court be reversed, and that he, the said defendant, go hence sine die.

Dated: July 20, 1945.

(Signed): LEO R. FRIEDMAN
Attorney for Defendant
Albert Feigenbaum.

(Acknowledgment of Service.)

[Endorsed]: Filed July 20, 1945. [128]

[Title of Court and Cause.]

ASSIGNMENT OF ERRORS FOR
APPELLANT ABEL

Lewis Abel, one of the appellants herein, complains of the judgment of the above entitled matter, of the order overruling his demurrer to the indictment, of the order denying his motion for a new trial and of the order denying his motion in arrest of judgment and of the rulings of the District Judge on the trial of this case and each of them, and avers that in the proceedings in said cause and in the above mentioned orders, rulings and judg-

ment manifest error has occurred to the prejudice of said appellant of which he makes the following

ASSIGNMENTS OF ERROR

which he asserts and intends to urge and rely upon in the Circuit Court of Appeals for the Ninth Circuit upon his appeal herein.

1. The District Court erred in overruling this appellant's demurrer to the indictment.

2. The District Court erred in overruling this appellant's motion for a new trial.

3. The District Court erred in overruling this appellant's motion in arrest of judgment.

4. The District Court erred in holding that the indictment states a public offense against this appellant.

The District Court erred in each of the following rulings on the evidence:

5. In admitting in evidence as against this appellant, United States Exhibit 2 for identification, a document entitled "Wholesale Liquor Dealers' Monthly Report Summary of Forms 52A and 52B" (a document showing the purchases of the Francisco Distributing Company during the month of December, 1943) to which defendant Abel objected on the ground that said document was incompetent, irrelevant and immaterial and that no proper foundation had been laid therefore; that it had nothing to do with the [130] issues in the case and that any purchases of any commodity made by the de-

defendant Goldsmith or The Francisco Distributing Company were not in issue; upon the further ground that said document was hearsay as to this appellant and to the overruling to which objections this appellant excepted.

6. In admitting in evidence Government's Exhibit No. 3 for identification entitled "Wholesale Liquor Dealers' Monthly Report Summary of Forms 52A and 52B" bearing the date of January, 1944, to which appellant Abel made the same objections as to United States Exhibit 2 and to the overruling of which he excepted.

7. In admitting United States Exhibits 4, 5, and 6, or any of said three exhibits, which consisted of the 52A and 52B records of the Francisco Distributing Company which had been filed through the months March, 1942 to the month of December, 1943. These three exhibits were admitted in evidence for the limited purpose of showing that there were no sales of the particular whiskey mentioned in the indictment covered by the said reports to the introduction of which this appellant objected upon the ground that the same were incompetent, irrelevant and immaterial and no part of the res gestae and that there was no foundation laid for the introduction thereof and to the overruling of which objections he excepted.

8. In refusing to strike out the testimony of the defendant Robert Otis Grubbs on the ground that the same was incompetent, irrelevant and immaterial and not binding on this appellant. Said

testimony was first, that said witness was chief claims clerk of the Santa Fe Railroad in San Francisco and had been working for said railroad since 1902; continuously since 1911; he produced a freight bill marked United States Exhibit 7 for identification; a bill of lading marked United States Exhibit 8 for identification, which freight bills are kept as a permanent office record pursuant to the conduct of the Santa Fe's business and [131] which was received in evidence. Both were for whiskey "Old Penn Midland Imp. Corp. Ntfy Francisco Distributing Company". Exception.

9. In refusing to strike out the following testimony of the witness Fred A. Sander, "that portion was delivered from the car under orders from the Francisco Distributing Company. It didn't go into the warehouse. 1426 cases were delivered ex car. By 'ex car' I mean delivered right from the car on arrival. 1426 cases were delivered from the car on arrival." Counsel for this appellant moved that the last statement of the witness be stricken out on the ground that it was incompetent, irrelevant and immaterial hearsay and that there was no foundation laid for it and excepted to the denial of said motion. In overruling the following objection, "Mr. Colvin: Q. Mr. Sander, who, if any one, instructed you regarding the unloading of the two freight cars whose numbers appear in your records?", objected to as incompetent, irrelevant and immaterial and assuming something not in evidence. Overruled; exception.

10. In overruling the objection to the following question of the same witness: "Q. What was the content of this conversation relating to these shipments?" Objected to as incompetent, irrelevant and immaterial hearsay, no part of the res gestae not within the charge of conspiracy so far as this appellant is concerned and asked that if the conversation was related, the jury be instructed to disregard the statement as to this appellant. Objection overruled; request for instruction denied; exception. Objected to as hearsay; objection overruled; exception.

11. In admitting in evidence United States Exhibit 9 showing the receipt of 650 cases of whiskey from Pennsylvania car P.R.R. 568500. Objected to as incompetent, irrelevant and immaterial. Overruled; exception.

12. In admitting in evidence United States Exhibit No. 10 consisting of car instructions "Francisco Distributing Company" to deliver various lots of cased distilled spirits called "Old [132] Mr. Boston Rocking Chair" to respective people, customers of theirs.

Objected to as incompetent, irrelevant and immaterial and calling for the opinion and conclusion of the witness and hearsay. Exception.

13. In admitting United States Exhibit 14 consisting of an order for the entire operation of the distribution of the contents of that car.

Objected to as incompetent, irrelevant and self-serving. Overruled; exception.

14. In making the following ruling:

The Witness (Sander): I sent a bill for the services which my company rendered in this matter.

Q. To whom did you send the bill?

Objected to as self-serving. Overruled; exception.

15. In making the following ruling:

Q. Did Mr. Goldsmith visit the bank with reference to this transaction?

Objected to as leading and suggestive. Overruled; exception.

16. In giving the following instruction to the jury during the examination of the witness Joseph N. Nathanson:

The Court: I will instruct the jury at the present time that pursuant to the authority given to me by statute, the Price Administrator on May 22, 1943, promulgated an Order No. 5 in which he fixed the maximum prices for all sales by Ben Burke Inc., Foster & Company and American Distilling Company as follows: That on or after May 24, 1943 Ben Burke Inc., Boston, Massachusetts; Foster & Company, New York City and American Distilling Company, Beacon, Illinois, may sell and deliver to any person and any person may buy and receive from those sellers "Old Mr. Boston Rocking Chair Whiskey", a blend of straight burbon whiskeys, 80.6 [133] proof, aged, as above, at the following prices: \$19.24—that is not in issue; that is another kind of whiskey?

Mr. Colvin: That is for pints.

The Court: \$15.37 plus \$3.87 being the amount of the increased excise federal tax of November 1942, applicable thereto, or a total of \$19.24 for twelve bottles, each bottle containing one-fifth gallon of said whiskey. Now, do you wish to take exception of that?

Objection to what the court told the jury and request that the jury be instructed to disregard anything just read from the Federal Register or advised about upon the following grounds:

First: That the purported order is only an order that regulates processors of these particular distilled products; it has nothing to do with wholesalers; it has nothing to do with people who buy from wholesalers or jobbers—that is the portion you have instructed the jury about—and therefore that this portion of the order is not binding upon this appellant who is neither a processor nor a seller of distilled spirits.

Secondly: Upon the ground that the order on its face is in violation and in excess of the power conferred by the Emergency Price Control Act for these reasons:

That under the Emergency Price Control Act the Administrator has the power by general order and by general order only, to fix the prices of any commodity within a particular area or region and that he has not the power and never was given the power by Congress to fix different prices for different people for the manufacture of the same

kind of article and this is a special order applicable only to certain people.

Further objected to that this testimony and this regulation for this purpose is incompetent, irrelevant and immaterial. We are not here charged with any dealings with Burke or the American Distillery or anyone else; and as involving an [134] an unlawful delegation of power.

Objections overruled; exception.

17. In the following ruling:

(The Witness [Nathanson] Continuing): I am familiar with Government's Exhibit No. 8 and with the date thereon.

Q. Mr. Nathanson, I call your attention to Section 24 of the Alcoholic Beverage Control Act, said section being published at page 2017 of the California Code General Laws and Constitution 1941 Supplement of Deering, published by Bancroft & Whitney Company and ask you if you are familiar with that section?

Objected to as incompetent, irrelevant and immaterial.

Overruled; exception.

18. In the following rulings during the testimony of Norman Reinburg:

Q. At the time you gave the check to Mr. Abel, what was said with regard to the payment of cash.

Objected to as leading and suggestive.

Overruled; exception.

The Witness: That I pay the balance in cash upon receipt of the bill.

Mr. Colvin: Q. Did Mr. Abel say that was the selling price, \$2,450.00? A. Yes.

Objection to the question as leading.

Overruled; exception.

19. In the following ruling on the testimony of the same witness.

Q. Were 100 cases of "Old Mr. Boston Rocking Chair Whiskey" delivered to you?

Objected to as incompetent, irrelevant and immaterial and calling for the opinion and conclusion of the witness.

Overruled; exception. [135]

20. In overruling objection to the following testimony:

During this period of time I traveled to San Francisco with Mr. Abel on two occasions. The first occasion was about the 6th or 7th of December. I took Mr. Abel with me in my car. I took him in the downtown section here about three or four blocks off Market about 3rd or 4th. The place was a jewelry store, pawn shop, sports goods. I left Mr. Abel off at this sports goods shop. I had a conversation that I would pick him up there in one-half hour. I drove down there on the date of the first trip at Mr. Abel's direction. He did not say to drive to this particular sports goods shop; he said "up that street and down that street and stop here".

Objection overruled; exception,

21. In the following ruling during the testimony of witness John Giometti:

Q. At that time did you give any cash to Norman Reinburg?

Objected to as calling for evidence not binding on this appellant. Overruled; exception.

The Witness: I gave him the balance of the \$65.00 a case.

(The Court:) \$2,025.00.

22. In the following ruling:

(Same witness) Mr. Colvin: Q. What was that conversation with Mr. Abel regarding your purchase of this whiskey?

Objected to as incompetent, irrelevant and immaterial; not within the issues of the conspiracy charged in the indictment for the reason that anything that defendant Abel may have said if it was subsequent to the conclusion of the transaction, would not be within the issues and would not be competent or pertinent after the transaction had been concluded.

Overruled; exception.

23. In the following ruling during the testimony of [136] Victor Figone.

During the month of December, 1943 I made a purchase of "Old Mr. Boston Rocking Chair Whiskey". I purchased the whiskey from some gentlemen in the Francisco Distributing.

Question objected to on the ground that founda-

tion therefore had not been laid and not binding on this appellant and hearsay.

Overruled; exception.

24. Motion to strike answer on the ground that it was not connected with this appellant.

Overruled; exception.

25. In the following ruling during the testimony of Milton Avila.

During the months of December, 1943 or January, 1944 I purchased 75 cases of "Old Mr. Boston Rocking Chair Whiskey". All my dealings were with Mr. Figone. I paid \$60.00 a case. That payment was some odd \$1800.00 by check, the rest of it cash. I delivered that check and cash to Mr. Figone. Subsequently I received the whiskey. A big dual truck came on January 3 and Victor helped me unload mine and I helped him unload his. The invoice of that whiskey came by mail within the following week some time; I don't remember exactly when, billed "Francisco Distributing Company". The check had been made payable to Francisco Distributing Company. I never went over to Francisco Company.

Motion that this testimony be excluded as not binding on this appellant; hearsay; incompetent, irrelevant and immaterial.

Overruled; exception.

26. In the following ruling during the testimony of James Cermusco.

Mr. Colvin: Q. At whose direction did you stop at that place on 3rd Street? [137] -

Objected to as incompetent, irrelevant and immaterial.

Overruled; exception.

27. The following ruling during the testimony of same witness:

I had a conversation the time I stopped on 3rd Street that day as to where the whiskey was and he said it was in the San Francisco Warehouse.

Q. And what did you say to that?

Objected to as hearsay.

Overruled; exception.

28. In the following ruling during the testimony of Henry L. Taylor.

The Witness: (continuing) I had a conversation with Mr. Feigenbaum. That conversation took place at the sports goods store which I have mentioned. Besides Mr. Feigenbaum and myself, my wife and Mr. Humes were present and there were two other parties there.

Q. What was that conversation regarding the purchase of whiskey?

Objected to as incompetent, irrelevant and immaterial, the corpus delicti of the charge in this indictment has not been laid and until the corpus delicti is established by any acts, declarations or statements of the defendant, an alleged co-conspirator are inadmissible.

Overruled; exception.

29. The following ruling:

(Same witness) I had a conversation with the man to whom I gave the check which took place in the street in front of this bar. Besides myself and little Joe, Mr. Humes and this man Tucker were present.

Q. What was the conversation?

Objected to on the ground that the conversation was not [138] binding upon this appellant because it was a conversation occurring out of his presence.

Overruled; exception.

30. In the following:

(Same witness): Q. What conversation did you have with Mr. Feigenbaum on that date regarding the whiskey..

Objected to as incompetent, irrelevant and immaterial; proper foundation not laid. We have no proof of the corpus delicti or fact, act, statement or declaration of an alleged co-conspirator * * *.

Overruled; exception.

31. In the following during the testimony of Ruth Taylor.

I did not witness the payment in cash of any money to Mr. Feigenbaum on that occasion . . . there was a discussion about writing the check. . .

Q. What was that discussion.

Objected to as incompetent, irrelevant and immaterial and as calling for acts, declarations and

transactions participated in and performed by defendant Feigenbaum when the substance of the offense charged had not yet been established.

Overruled; exception.

32. In the following from the testimony of Raymond C. Hughes.

Q. What was the conversation you had with Mr. Feigenbaum?

Objected to as calling for the act or declaration on the part of the co-conspirator in the case and that there had been no proof of the corpus delicti.

Overruled; exception.

33. The following in the testimony of Walter J. Vogel.

Q. Did you give any cash to this man in addition to [139] this check?

Objected to as being without foundation.

Overruled; exception.

34. The following in testimony of Francis Duffy.

The Witness: (continuing) I gave this check (Government's Exhibit 48 for identification) to that man. The date of my first conversation with the man was about the 3rd or 4th of December, and took place at my place of business. I was the only one present. My father was sick. I imagine the time of the conversation was in the early part of the afternoon, around 1:30.

Again objected to as not binding upon this appellant.

Overruled; exception.

35. Following in testimony of Angelo Lombardi. Then said "the whiskey will be up there in a few days". Mr. Minkler said that. I went back to Santa Rosa with him.

Q. What happened back at Santa Rosa regarding this transaction?

Objected to as hearsay and not binding on this appellant.

The Witness: (Continuing) We just left there and Minkler went back to his own place of business and I went back to mine, and about two or three days after he called up and said that the whiskey was on its way.

Objection to this evidence and to anything that happened between Minkler and this witness.

Objections overruled; exception.

36. The following in testimony of Walter H. Travis.

Q. You say the check was written before you arrived at the sportorium? Will you clarify that testimony please.

Objected to as cross-examination of own witness. There is nothing to clarify.

Objection overruled; exception. [140]

37. In the following, same witness.

(Cross-examination) "Q. But the truth is you have never been indicted in this conspiracy that you were also in. A. No."

Mr. Colvin: I ask that that be stricken.

Mr. Colvin: It is an assumption of counsel that the witness was, in the conspiracy.

The court granted the motion to strike the testimony.

Exception.

38. In granting the following motion of the Government at the close of all the evidence.

Mr. Colvin: Your Honor, for the sake of the record, I take it that the record will show that the Government does offer all evidence which has been admitted against any defendant as against all the defendants, and that further, the Government now makes an offer of all documents marked for identification to be admitted against all of the defendants.

Mr. Colvin: I further move that the documents 1-14 inclusive, which have been admitted against individual defendants, be admitted as against individual defendants, be admitted as against all.

Mr. Fredman: I understand that the motion concretely of the Government at this time is that all testimony and all documents, irrespective of how they came into the record up to this time, be now admitted against all defendants.

Mr. Colvin: That is the motion.

Mr. Friedman: First we come to the one I discussed last Friday, the testimony of Edward Hark-

ins. We object—I say “we”—I mean the defendant Feigenbaum—We object to the admission of this testimony, which was admitted solely against the defendant Weiss, on the ground that it calls for a conversaton had by Harkins with Goldsmith on two occasions, and testimony had by Harkins with Weiss and Goldsmith on one occasion, as I recall it, [141] in which it is alleged that the defendants Goldsmith and Weiss made certain statements and declarations, all of which were as to past events.

We object to the admission in evidence against the defendant Feigenbaum of the testimony of Sander as to any conversations he had with Weiss, upon two grounds: First, that part of that conversation and alleged utterances by Weiss were narrative of past events, and upon the second ground that they are declarations of an alleged co-conspirator made out of the presence of Feigenbaum, that they are hearsay, that the corpus delicti of the conspiracy has not been established, and that there is no evidence to show that Feigenbaum was a member of that conspiracy, and therefore the statements, acts and declarations of a co-conspirator made out of his presence cannot be admitted in evidence against him for any purpose.

The defendant Feigenbaum objects to the admission in evidence against him of any of the testimony given by the witness Giometti on the ground that it is hearsay, that it calls for acts and declarations of third parties out of the presence of the defendant Feigenbaum, and even the acts and declarations of people that Feigenbaum never even knew or heard

of, given at another time, and upon the further ground that the corpus delicti has not been established, and that therefore these matters cannot be competent evidence against Feigenbaum. And during the course of Mr. Giometti's testimony there was introduced for identification Government's Exhibit No. 24, which was an invoice, and Government's Exhibit No. 25, which, I think, was a freight bill, or waybill, of some kind or other. And we object to the admission of Government's Exhibits 24 and 25 in evidence against the defendant Feigenbaum, on the ground they are hearsay, proof of the conspiracy has not been established, that the connection of the defendant Feigenbaum with such conspiracy has not been [142] established at all.

First having objected in general to all the testimony of Giometti, we now object to this specific portion of Giometti's testimony going into evidence against the defendant here upon the ground that it is incompetent, irrelevant, and immaterial, that the corpus delicti of the offense has not been established, and it calls for acts and declarations between third persons made out of the presence of the defendant Feigenbaum, and there is no proof he was a member of any conspiracy, or that he authorized, had knowledge of, or ratified any such conversation or acts on the part of Abel.

So far as the testimony of Mr. Reinburg is concerned, we object to the admission in evidence against the defendant Feigenbaum of the testimony given by Mr. Reinburg upon the ground it is hearsay, upon the ground it calls for acts, transactions

and events occurring out of the presence of the defendant Feigenbaum, that the corpus delicti of the offense has not been established, and there has been no evidence tending to establish the connection of Feigenbaum with any conspiracy charged or contained in the indictment filed herein, and that the testimony of Mr. Reinburg, so far as any acts, transactions or events he had with the defendant Abel are concerned, that the acts and statements and declarations of the defendant Abel are not binding upon the defendant Feigenbaum for the reasons I have stated.

During the examination of Mr. Reinburg there was offered for identification Government's Exhibits 22, 23, 34, and 35, 22 and 23 being bills and invoices, 34 and 35 being checks, and we object to the admission of each of these exhibits in evidence as against the defendant Feigenbaum for each and all of the reasons that we have urged against the admission of the testimony of the defendant Reinburg and the testimony of the [143] defendant Giometti, and upon the further ground that the proper foundation for none of these four documents has been established, and that there was no proof, first, as to the bills and invoices, that they were issued by the Francisco Distributing Company and, secondly, there was no proof that the checks written and given by Giometti and by Reinburg were ever received by the Francisco Distributing Company, or cashed by them. Again I confine, of course, the evidence as it appears against the defendant Feigenbaum.

I object to the admission in evidence against Feigenbaum of any testimony given by the witness Figone on all the grounds I have heretofore urged as to the admission of some of the testimony, that it is hearsay, that the corpus delicti of the charge has not been established; there is no independent evidence to show that there was a conspiracy, or that Feigenbaum was a member thereof, other than testimony as to the acts and declarations of alleged co-conspirators; that the testimony as to all those transactions and events occurring out of the presence of the defendant Feigenbaum, they are not binding on him, there being no proof he authorized, sanctioned, or even had knowledge of such transactions.

The Court: Mr. Friedman, it is your point, as I get it—and I think it is the serious point in this matter, going right to the nub of this matter, that here are several transactions disclosed in the evidence by which these men paid over the ceiling price for liquor, and there isn't any doubt that there is a prima facie showing as to the individual defendants participating in the transactions of that nature. But the point you make is the evidence fails to disclose any evidence of a concerted action on their part so as to make the substantive offense a conspiracy rather than the violation of a particular statute.

Mr. Friedman: That is correct.

I think this morning I objected to the Reinburg and Giometti testimony, to the Figone and the Avila testimony, as I recall it, and Exhibits Nos. 26 and

27, the check and invoice that were admitted on Figone's testimony. As to Figone, Avila, and those two exhibits, of course, Feigenbaum objects to their admission in evidence against him on all the grounds previously stated, and on the ground they are hearsay as to him; no foundation has been laid for the check or invoice establishing who actually received and deposited the check or who made the invoice; and that the corpus delicti has not been established, there being no proof that Feigenbaum was a member of any conspiracy, and there being no proof of any conspiracy, at all.

As to the witness James Cermusco, upon whose testimony there were marked for identification Exhibits 27, 28, 29, 30, 31, 32, and 33, I object to the introduction against the defendant Feigenbaum of Cermusco's testimony on the ground it is hearsay, the corpus delicti has not been established, it calls for acts, declarations and events by a third person out of the presence of Feigenbaum. It is not binding upon him, and I object to the admission in evidence of Exhibits 28 to 33, inclusive, upon the same grounds, and likewise upon the ground that no foundation has been laid for such checks, in that there was no proof as to who received or cashed them. There is no proof as to who issued the invoices.

Upon the same grounds I move to strike out the testimony of Vukota and Lewis, on the ground it is hearsay twice removed. These men, the testimony shows, only dealt with Cermusco. They never saw anybody named as a defendant in this case and, as

I recall it, anybody connected with the Francisco Company. Their acts, statements and declarations are hearsay as to [145] Feigenbaum, acts and declarations out of his presence, over which he had no control; the corpus delicti of the offense charged has not been established, and that there has been no independent proof identifying Feigenbaum with the conspiracy charged.

The next set of witnesses—and I can deal with them jointly—are Henry L. Taylor, Ruth Taylor, and Raymond C. Humes. This testimony was admitted as to Feigenbaum, and at this time I am going to move to strike it out on the following grounds, to wit, that such testimony of these three witnesses, all dealing with the same event, is entirely immaterial and incompetent, for the reason that the corpus delicti of the offense has not been established, and upon the further ground that all this showing was an independent, isolated transaction wherein Mr. Feigenbaum agreed to act as the agent for Mr. Taylor and Mr. Humes for the purchase for these people of 200 cases of whiskey, and that that was the agreement between the parties, and there was no agreement between Feigenbaum and either Taylor or Humes, or both of them, that Feigenbaum was to sell to either of these parties any whiskey.

On like grounds I move to strike out U. S. Exhibit 34, the check for \$4,900, testified to as having been written by Mrs. Taylor and delivered to Feigenbaum, and United States Exhibit No. 35, the invoice that was involved in that transaction.

I object to the admission in evidence of the testimony of Walter G. Vogel, together with U. S. Exhibits 45 and 46, which were introduced and marked for identification upon his examination. You will recall that Vogel testified that some strange and unidentified man came into his place and offered to sell him whiskey at \$24.50 a case for the Distributing Company, demanding a brokerage for all over that amount. There is absolutely no evidence that this man Vogel knew anybody connected with the charge [146] in this indictment whatsoever, and Vogel's testimony relates to an incident clearly res inter alios acta, hearsay as to the defendant Feigenbaum, the proof of the corpus delicti of the offense has not been established, and it calls for acts and transactions out of the presence of Feigenbaum, without any evidence to show that he knew, sanctioned, approved or ratified or authorized such transaction, and that goes to the two exhibits 45 to 46, as well as to Vogel's testimony.

I likewise object to the introduction in evidence against Feigenbaum of the testimony of Francis Duffy, together with United States Exhibits 47, 48, and 49, consisting of two checks and an invoice that were marked for identification upon Duffy's examination. The testimony shows that Duffy, who operates a tavern—a man came in, whom he couldn't identify, as I recall it; that he bought from this man 100 cases of whiskey at \$24.50 and paid the man a premium of \$20 a case, gave him a check for \$2000, a check for \$2450. The invoice came in, the name of the payee on this check was left in blank,

filled in by the man after he went away. The testimony of Duffy is wholly incompetent, absolutely hearsay, *res inter alios acta*, calls for transactions and events out of the presence of the witness Feigenbaum, which he is not shown to have sanctioned, ratified or confirmed, authorized, or approved in any way; that the *corpus delicti* of the charge of the indictment has not been established, or any evidence to show that he was a member of any conspiracy.

I object to the introduction in evidence of the testimony of Angelo Lombardi, together with U. S. Exhibits 50 and 51, which consist of a check written by Lombardi to a man named Minkler, and an invoice. Lombardi testified that in Santa Rosa he bought 100 cases and gave some cash to Mr. Blumenthal for it. Minkler contacted him about the whiskey. He went to San Francisco and talked to some man there, and so forth. That later on, on the 20th of December, he [147] came to the Sportorium with Minkler. He went into a back room and paid Blumenthal some money. I will object to this testimony, the check, and the invoice, upon the grounds I have heretofore stated, that the matter is purely *res inter alios acta*, is not binding on the defendant Feigenbaum, calls for acts, transactions and events out of his presence, over which he has no control, and they are not binding on him; the *corpus delicti* has not been established, and in this case, as in the others, it calls for the acts and declarations of a **co-conspirator** made out of the presence of Mr. Feigenbaum, and it is inadmissible, as these other matters are inadmissible for any purpose until the *corpus*

delicti has been established by independent testimony. On the same grounds, I object to the introduction in evidence of the testimony given by Herman Fingerhut, together with exhibits 53, 54, 55, 56 and 57, introduced upon his examination. Fingerhut owned a cafe in Vallejo. He said on December 3rd and 4th he saw Blumenthal, bought 200 cases of whiskey at \$55; that later he and Mr. Travis went to the Sportorium and had another deal with Blumenthal.

I object to the testimony of this witness upon all the grounds I have heretofore stated. It calls for the declaration and conduct of an alleged co-conspirator, Blumenthal, out of the presence of the defendant Feigenbaum, and without any independent proof of the corpus delicti or of Feigenbaum's connection with the alleged conspiracy; upon the further ground it is hearsay, not binding on the defendant Feigenbaum; it constitutes acts that were done without his knowledge, consent, ratification or approval.

I object to the introduction in evidence of the testimony of Walter Travis, together with Government's Exhibits 58, 59 and 60, consisting of two invoices and a freight bill. The testimony of Walter Travis was the same as that of Fingerhut, except that in the first deal Fingerhut took 100 and Travis took 100, and in [148] the second, hundred, 75 were for Travis and 25 for Fingerhut.

I object to the introduction of this testimony and the three exhibits I have designated, upon all the grounds I have objected to the testimony of Finger-

hut and the checks and invoices involved in Fingerhut's testimony.

I object to the testimony as against the defendant Feigenbaum, of the testimony given by the witness A. P. Jones. Mr. Jones, as I recall, testified to certain Alcohol Tax Unit forms 52-A and 52-B, which were marked Government's Exhibit No. 2 and Government's Exhibit No. 3, and Government's Exhibits 4, 5, and 6. These forms were introduced for the purpose of showing the purchase or lack of purchase of certain whiskey by the Francisco Distributing Company during certain months. I object to those forms being in evidence against Feigenbaum, on the ground they are *res inter alios acta*. They constitute hearsay as to him. No proper foundation has been laid as to any of these forms, and there is no proof they were executed by any alleged conspirator in this case; that they are hearsay as to Feigenbaum, and that they cannot be considered for any purpose in determining his guilt or innocence.

I object to the introduction in evidence against Feigenbaum of the testimony given by the witness Robert Grubbs. Robert Grubbs was connected in some way with the Santa Fe Railway, and he testified to Government's Exhibits 7 and 8, and I object to the introduction of such exhibits in evidence, consisting of two freight bills for two carloads of whiskey, on the ground the matter is purely hearsay as to the defendant Feigenbaum. They are acts, transactions and events out of his knowledge, presence or hearing. It is not shown he knew of, ratified, confirmed, authorized or approved, and these

matters are wholly incompetent to be considered in determining the guilt or innocence of the defendant Feigenbaum. [149]

I likewise move to strike out the testimony of Fred A. Sander, or, rather, I object to the admission of the testimony of Fred A. Sander in evidence against the defendant Feigenbaum, together with United States Exhibits 9, 10, 11 and 12, which were introduced and marked upon the examination of this witness, upon the ground that the testimony of Mr. Sander, who was connected with the San Francisco Warehouse and executed two warehouse receipts, and testified as to certain instructions as to the disposal of the contents of the cars which he said were represented by those receipts supposed to have been given to him by the defendant Weiss. I object to all the testimony and all these exhibits I have enumerated, upon the grounds that as to the defendant Feigenbaum it is wholly incompetent, irrelevant, and immaterial and hearsay as to him, not binding upon him; that there has been no proof of the corpus delicti or the defendant's connection with any conspiracy, or the conspiracy set forth in the indictment. These matters are merely *res inter alios acta*, and I object to their admission. Additionally, I object to the admission of that portion of Mr. Sander's testimony which has to do with conversations he said he had with the defendant Weiss on December 15th and on December 17th, relative to delivery orders, invoices, and what was to be done with these two cars of whisky, upon the grounds that that evidence constitutes the acts, declarations

and statements of an alleged co-conspirator, made out of the presence of the defendant Feigenbaum, and there being no proof of the corpus delicti, the same as that binding on the defendant Feigenbaum.

I likewise object to the introduction in evidence against the defendant Feigenbaum of United States Exhibits 13 and 14, which have to do with certain invoices of a carload of whisky out of a B&O Railroad car, upon all the grounds I have objected to the other portions of the admission of the other railway [150] receipts and instructions, as testified to by Sander under the prior exhibits; and additionally, I object to the admission against Feigenbaum of the testimony of the witness Sander relative to a conversation he said that he had with Weiss on January 3, 1944, in which the invoices were received by Weiss, and in which Weiss told him to do something about the delivery, on the ground that the testimony as to the acts and declarations of an alleged co-conspirator is inadmissible and not binding upon Feigenbaum, and there has been no independent proof of the corpus delicti of the offense, or Feigenbaum's connection with any alleged conspiracy.

I object to the admission in evidence against the defendant Feigenbaum of the testimony of the witness Frank Dito, of the Bank of America, and likewise the admission in evidence against the defendant Feigenbaum of United States Exhibits 16, 17, 18, 36, 37, 38, 39, 40, 41, 42, 43, 44 and 45. I object to all these matters in the testimony of Dito upon the ground they all have to do with the bank account and the affairs of the Francisco Distributing Com-

pany. They are matters and things of which the defendant Feigenbaum is not shown to have had any knowledge, any control over, acts and things done out of his presence, hearsay as to him, and that in every instance no foundation has been laid for the introduction of any of these documents, checks or statements that were introduced under Dito's testimony, for the reason that there has been no preliminary proof as to the endorsers or depositors, and so forth, of the account. And that includes the so-called signature card, which is supposed to have been the one with which the account was opened for the Francisco Distributing Company in the name of Goldsmith and Weiss. I object to that, which is Government's No. 15, particularly upon all the grounds I have heretofore stated in discussing the exhibits admitted [151] under the testimony of Frank Dito, and upon the further ground that no foundation for the signature card has been presented so far as the defendant Feigenbaum is concerned, and there is no proof that either Goldsmith or Weiss signed or executed the same.

I move that there be excluded, and if it has been admitted, that there be stricken out, so far as the testimony of the Witness Joseph Nathanson is concerned, any computation of the figures he has given so far as the so-called ceiling price under the Emergency Price Control Act of whisky is concerned, on the ground it is not the subject of expert testimony. I think I have covered them all.

The Court: The various motions to strike will be denied and exceptions noted. The Court will adhere

to its ruling that the evidence and the exhibits will be admitted against all the defendants, save in the case of the testimony of the last witness, Mr. Harkins, whose testimony will be admitted as it relates to conversations with the defendant Goldsmith as to him, and with respect to conversations with the defendant Weiss as to him, Mr. Weiss, and with respect to both of them, where the conversations were had with both of them.

Mr. Friedman: Our exceptions to each ruling are noted.

The Court: Each counsel will have his exceptions.

Mr. Riordan: Do I understand that motion is made on behalf now of all the defendants?

The Court: Oh, yes. Let the record show that the specific exceptions that Mr. Friedman has taken with respect to his client made with respect to all the exhibits and testimony are deemed to have been taken by each of the defendants' counsels in like manner and exceptions noted on behalf of each.

Mr. Dunne: Your Honor, we should add to them in some [152] instances with respect to the defendant Goldsmith, with regard to the conversations with the last witness, and we want to state these as objections where the evidence has not gone in, and motions to strike it out where it has gone in, that the testimony is incompetent, irrelevant and immaterial. The testimony of the extrajudicial statements not part of the *res gestae* of a defendant and an alleged party to the conspiracy is not admissible prior to independent proof as to him of the exis-

tence of the conspiracy and the corpus delicti. As to the documents, there was no evidence, aside from such extrajudicial statements that brings home to the defendant Goldsmith any knowledge, information or proof that he had any connection with any documents, bank accounts, or anything else, except such extrajudicial statements of the witness Harkins, and accordingly as to him there was no showing of a connection between him and what purported to be the documents of the San Francisco Distributing Company.

I want to add certain objections to those stated by Mr. Friedman as to Government's Exhibits 2, 3, 4, 5, and 6. There is no identification as to the forms 52-A and 52-B. It is not shown by whom they were made. It appears that they were some place in the files of the witness Jones, or in the files over which he had charge, but there is no showing by any proof of any sort that they were made in the ordinary course of business, no foundation laid for their admission as a record made in the ordinary course of business.

The same goes as to 7 and 8, the freight bills.

Now, without repeating in detail, I do not think—Mr. Friedman can correct me as to this—I do not believe Mr. Friedman made objections to those conversations which were had and the documents introduced in connection with the transactions that were with Mr. Feigenbaum, did you? [153]

Mr. Friedman: Oh, yes, I did.

The Court: He made a motion to strike those.

Mr. Friedman: I made a motion to strike those,

because those had already been admitted as against Feigenbaum.

Mr. Dunn: Because, of course, as to things that happened in Feigenbaum's own presence, our position as to things that happened in his presence is Mr. Friedman's position with respect to Feigenbaum as to what happened in Abel's presence, Blumenthal's presence, and so forth. So we want the record to show that as to each item of evidence in connection with the transactions allegedly participated in by the defendant Feigenbaum, our objection goes that it is incompetent, irrelevant, and immaterial, hearsay, *res inter alios acta*, without foundation, no proof of the *corpus delicti*, and no independent proof of the connection of any defendant with any alleged conspiracy of which Feigenbaum, or any other party with whom Feigenbaum dealt, was a party.

The Court: The record will also show that each of the other defendants has made the same motion, made the same objections with respect to the evidence pertaining to the defendant Feigenbaum.

Mr. Riordan: That is right.

The Court: So the record will be clear on that.

Mr. Dunn: Exception noted as to that.

The Court: Exception noted.

39. Mr. Friedman: During the course of the argument yesterday, Your Honor asked Mr. Colvin whether or not in these transactions where an independent intermediary,—whether or not he considered this independent intermediary was on the same footing with the defendants in this case, that is, on

the same footing as a conspirator, an agent for the conspirators. He answered "yes." [154] While we objected to the admission of that testimony yesterday, for the purpose of completing my record I move the court to strike out so far as the defendant Feigenbaum is concerned, all the testimony given by the witness Victor Figone and by the witness Melvin Avila together with United States Exhibits 26 and 27, a check and an invoice, on the grounds which we urged against the admission of this testimony originally, and upon the further ground that this testimony constitutes simply the extrajudicial statements and acts and declarations of an alleged co-conspirator said and done out of the presence of defendant Feigenbaum, and without any proof of his knowledge, authorization or consent to such statements or transactions.

The Court: Inasmuch as I have granted the motion to apply the testimony of these witnesses, as well as all the testimony, as against all the defendants, I will deny this motion. You may have an exception. Do the other defendants wish to join in this motion * * *

Mr. Wolff: Yes, Your Honor * * *

The Court: It may be so deemed and an exception noted.

40. Mr. Friedman: * * * I will likewise, on the same grounds and for the same reasons, move that the testimony of the witnesses James Cermusco, John Vukota and V. M. Lewis be stricken in so far as the defendant Feigenbaum is concerned, upon all the grounds urged against the admission of such tes-

timony and upon the further ground that the testimony of these three witnesses merely concern the extrajudicial statements and acts of an alleged co-conspirator said and done out of the presence of defendant Feigenbaum and without any proof of his authorization, knowledge or consent. That refers to the testimony together with Government's Exhibits 28, 29, 30, 31, 32 and 33 introduced under such testimony.

The Court: The other defendants join in that motion? * * * [155]

Mr. Wolff: Yes, Your Honor * * *

The Court: The motion will be denied and exceptions noted for all the defendants.

41. Mr. Friedman: I likewise move to strike out the testimony of Walter Vogel and United States Exhibits 45 and 46 upon all the grounds heretofore urged as to the admission of such testimony, and upon the further ground that it is merely testimony relating to an extrajudicial act and declaration of the co-conspirator said and done out of the presence of defendant, and without any proof of his authorization, knowledge or consent thereto.

The Court: Do the defendants join in this motion? * * * (the other defendants indicated their assent).

The Court: The motion will be denied and the exceptions noted for all the defendants.

42. Mr. Friedman: As to the witness Francis Duffy and Exhibits 47, 48 and 49 I move that this testimony and these exhibits be stricken out upon all the grounds that I urged for the striking out of

the testimony and the exhibits given under the testimony of Walter Vogel.

The Court: The same ruling and the same exceptions noted:

43. That the District Court erred in overruling the motion of this appellant at the close of all the evidence for a directed verdict and a dismissal of the indictment, to the denial of which motion this appellant duly excepted.

That the court erred in refusing the following instructions requested by defendant Abel: [156]

44. The evidence in this case is insufficient to warrant the conviction of the defendant Louis Abel and you are, therefore, instructed to return a verdict of not guilty.

Refused; Exception.

45. I charge you that you cannot convict the defendant Louis Abel on suspicious circumstances, no matter how strong the circumstances may be; nor should you return a verdict of guilty on mere conjecture or speculation.

Refused; Exception.

46. A conspiracy to commit a crime is not likely to exist between strangers.

Refused; Exception.

47. The defendant Louis Abel is only on trial for the offense of conspiracy as set forth in the indictment. He is not on trial for the offense of either buying or selling whiskey in excess of or

higher than the maximum price established by law; he is not on trial for the buying or selling of whiskey at all.

Refused; Exception.

48. The indictment in this case charges the defendant Abel with having conspired with Albert Feigenbaum, Lawrence B. Goldsmith, Samuel S. Weiss and Harry Blumenthal to unlawfully sell, at wholesale, certain Old Mister Boston Rocking Chair Whiskey in excess of and higher than the maximum price established by law. If you find from the evidence that the defendant Abel merely purchased or agreed to purchase certain cases of Old Mister Boston Rocking Chair Whiskey from any other defendant in this case or that the defendant Abel merely acted as the servant or agent or for or on behalf of Norman Reinberg or others for the purpose of purchasing for them certain Old Mister Boston Rocking Chair Whiskey from one or more of the other defendants in this case, and if you further find that the said defendant Abel was not acting as the servant, agent or employee of any other defendant in this case and [157] was not acting for or on behalf of any other defendant named in this case, for the purpose of selling said whiskey, then you must return a verdict herein finding the defendant not guilty.

Refused; Exception.

49. If you find from the evidence in this case that the acts and conduct of the defendant Louis

Abel amounted to no more than an action on his part to purchase, either for himself or for some other person, Old Mister Boston Rocking Chair Whiskey, and that he did so purchase said Whiskey, then you must find that the defendant Abel was not a member of the conspiracy set forth and charged in the indictment and you must return a verdict herein finding the defendant Abel not guilty.

Refused; Exception.

50. I instruct you that where a transaction consists on the one hand of the selling of an article that is either prohibited by law or that is being sold in a manner that violates the law, and on the other hand by the purchase of such article by another person, then, under such circumstances, the buyer and the seller are not guilty of a conspiracy to sell such article. Therefore, if you find from the facts in this case that the transaction involved amounted on the one hand to some of the defendants, other than Abel agreeing to sell the whiskey described in the indictment at a price prohibited by law, and on the other hand that the defendant Abel merely agreed to purchase for himself or some other person, some of said whiskey at said price, then you must find that the defendant Abel was not a member of any conspiracy that had for its object the selling of said whiskey, he being merely a purchaser or agent for the purchaser thereof. Under such circumstances you must return a verdict finding the defendant Abel not guilty.

Refused; Exception.

51. If you find from the evidence in this case that the defendant Abel did agree with a man named Reinberg or some other [158] person to sell to either or both of such persons certain Old Mister Boston Rocking Chair Whiskey at a price in excess of the maximum price established by law, but if you also find that the defendant Abel had not agreed with any other defendant in this case to sell any Old Mister Boston Rocking Chair Whiskey at a price above that provided by law, then you must return a verdict herein finding the defendant Abel not guilty on the ground that he was not a member of the conspiracy charged in the indictment.

Refused; Exception.

52. If you find from the evidence that two or more defendants in this case other than the defendant Abel had conspired and agreed together to sell said whiskey described in the indictment at a price in excess of that established by law, and that after the formation of such conspiracy the defendant Abel did do some act either individually or in conjunction with some other person, which act operated in furtherance of the objects of the prior conspiracy, but that in the doing of such act or acts the defendant Abel had no knowledge of the existence of any such conspiracy, then you must return a verdict finding the defendant Abel not guilty for the reason that he never became a member of the conspiracy as charged and set forth in the indictment.

Refused; Exception. [159]

The court erred in giving the following instructions to the jury, to each of which the defendant Abel excepted:

53. However, a person is presumed to intend to do all that which he voluntarily and willfully does in fact do, and must also be presumed to intend all the natural, probable and usual consequences of all his own acts.

54. If such discrepancies or inconsistencies are not material and they do not affect the true issues of this case, and if they do not reasonably bear upon the guilt or innocence of the defendants, or any of them, do not waste your time in considering them.

55. In other words, when an unlawful end is sought to be effected, and two or more persons, actuated by the common purpose of accomplishing that end, work together in any way in furtherance of the unlawful scheme, every one of such persons becomes a member of the conspiracy.

56. Each party must be actuated by an intent to promote the common design. If persons pursue by their acts the same unlawful object, one performing one act and a second another act, all with a view to the attainment of the object they are pursuing, the conclusion is warranted that they are engaged in a conspiracy to effect that object.

57. You may find any one of the defendants either guilty or not guilty, in accordance with the rules and statements as to the law that I have given to you.

In giving the following instructions to the jury:

57. The Court: Then the court will state, for the benefit of the jury, that the court has granted a motion of the Government to admit all the testimony heretofore offered against all the defendants with the following exception: /

That the testimony of the last witness, Mr. Harkins, is admitted in evidence as against the defendant Goldsmith as to [160] conversations had by the witness with the defendant Goldsmith; that his testimony is admitted as to the defendant Weiss with respect to conversations with the defendant Weiss; and as to both defendants Goldsmith and Weiss and as to all conversations at which both defendants Goldsmith and Weiss were present and exceptions are noted as to this ruling on behalf of all the defendants separately.

Wherefore, appellant Abel prays that the judgment and orders appealed from may be reversed.

(Signed) GEORGE G. ÖLSHAUSEN,

Attorney for said Appellant.

(Acknowledgment of Service.)

[Endorsed]: Filed July 21, 1945. [161]

[Title of Court and Cause.]

ASSIGNMENT OF ERRORS OF DEFENDANT
SAMUEL S. WEISS

Now comes Samuel S. Weiss, one of the defendants and appellants in the cause numbered and entitled as above, who has heretofore appealed to the United States Circuit Court of Appeals for the Ninth Circuit from the judgment and sentence given, made, and entered against him in said cause in and by the said District Court, and having duly given his notice of appeal in the manner and form provided by law, and by the Rules adopted and promulgated by the Supreme Court of the United States governing appeals in criminal cases, files this, his assignment of the errors upon which he will rely for a reversal of the judgment and sentence aforesaid, and says, that in the record and proceedings aforesaid, as also in the judgment of the plea herein, manifest error hath happened to the grievous damage of him, the said Samuel S. Weiss, in each and every of the following particulars, to-wit:

I.

That said District Court erred in granting the motion of counsel for the United States of America, made at the conclusion of the taking of testimony upon the trial of said cause, to admit all evidence which had been admitted against any defendant as against all defendants and to admit all documents theretofore marked for identification in evidence against all the defendants, to which ruling of the

said District Court this defendant Samuel S. Weiss, in propria persona, duly Excepted.

II.

That the said District Court erred in denying the motion of this defendant at the conclusion of the case for the Government that the Court instruct the jury to find this defendant not guilty, to which ruling and order of the [163] said District Court, this defendant Samuel S. Weiss, duly Excepted.

III.

That said District Court erred in denying the motion made by said defendant Samuel S. Weiss after all the testimony and evidence had been introduced and both sides had rested the case for an instructed verdict of not guilty as to the said defendant Samuel S. Weiss, to which ruling and order of the said District Court this defendant Samuel S. Weiss duly Excepted.

IV.

That the said District Court erred in denying the motion of said defendant Samuel S. Weiss for a new trial, to which ruling and order of the said District Court this defendant Samuel S. Weiss duly Excepted.

V.

That the said District Court erred in denying the motion of said defendant Samuel S. Weiss in arrest of judgment, to which order and ruling of said District Court said defendant Samuel S. Weiss duly Excepted.

VI.

That the said District Court, upon the trial of said cause, erred in admitting in evidence over the objection of said defendant, "U. S. Exhibit 2," the said exhibit being a document entitled "Wholesale Liquor Dealers Monthly Report Summary of Forms 52-A and 52-B," showing the purchases of the San Francisco Distributing Company during the month of December, 1943, as kept in the records of the United States Internal Revenue Department, to which ruling of the court said defendant Samuel S. Weiss then and there duly Excepted.

VII.

That the said District Court, upon the trial of said [164] cause, erred in admitting in evidence over the objection of defendant Samuel S. Weiss, "U. S. Exhibit 3," the said exhibit being a document entitled "Wholesale Liquor Dealers Monthly Summary of Forms 52-A and 52-B," showing the purchases of the Francisco Distributing Company during the month of January, 1944, as kept in the records of the United States Internal Revenue Department, to which ruling of the court said defendant Samuel S. Weiss then and there duly Excepted.

VIII.

That the said District Court erred in admitting in evidence over the objection of said defendant Samuel S. Weiss, "U. S. Exhibits 4, 5 and 6," the same being the so-called 52-A and 52-B records of the Francisco Distributing Company which had been

filed with said United States Internal Revenue Department from the month of March, 1942, to the month of December, 1943, to which ruling of the court said defendant Samuel S. Weiss then and there duly Excepted.

IX.

That said District Court erred in denying the motion of defendant Samuel S. Weiss to strike out the following testimony of the witness Fred A. Sander:

"1426 cases were delivered from the car on arrival."

upon the ground that the same was incompetent, irrelevant, immaterial and hearsay, to which ruling of the court said defendant Samuel S. Weiss then and there duly Excepted.

X.

That the said District Court erred during the examination of the said witness Fred A. Sander in admitting, over the objection of said defendant Samuel S. Weiss, the following evidence: [165]

"(The Witness Continuing): This is a part of that same deal wherein it is delivered from the car —this is stock delivered from the same car out of our warehouse. These invoices regard B & O car 174149, and they are part of the same transaction and the record kept by my firm, and they supplement the Government's Exhibit 13 which I just identified. They are part of the same transaction, the same car. That is our method of handling records. On one set of records we kept actual deliver-

ies taken from rail cars, and then future deliveries made from that stock. That last group of papers refers to an additional group of shipments than those contained in the last exhibit.

Mr. Weiss: Your Honor, at this time I would like to say I never gave him those. I am willing to have bills that I gave him admitted but those I do not know anything about I would rather object to their admission.

The Court: Well, in the form you make the objection, I will overrule it. I do not know what you are getting at. You may have an exception to the court's ruling.

The Witness: This is—we will take this as an example—an order for the entire operation for the distribution of that car. It reads 'Deliver to Dillons,' with a certain address, and an order number which reads—these are delivery orders, our instructions to deliver merchandise. This here attached is a report of the serial numbers of each case that went out on this order. The first pink document on top is the delivery order given to me by Mr. Weiss. Before deliveries of case whiskey can be made, we are required to take the number off—a record of the [166] number off each case and report it to the actual owner of the merchandise. The first is an order for my company to do certain things with the merchandise. The second sheet attached to the order is a list of the numbers of the particular merchandise I allocated to that order. This is a copy of the bill of lading on which the shipment was made. Our shipment to the customer that is repre-

sented on this order, that is a regular commercial document made up by all transportation people. It is the document of my own company. The next paper, as I stated before, is another order, the procedure of which is like the first one, I just—the rest of them are just duplicates of the first, referring to different points of delivery and different cases of whiskey. We make up bills of lading on all cases of distilled spirits moving out of our warehouse, whether city deliveries or shipments. Thereupon, counsel for the Government offered the document in evidence, to which counsel for the defendant Goldsmith objected upon the ground that it was incompetent, irrelevant and immaterial, self-serving and not binding upon the defendant Goldsmith. The Court admitted the document in evidence as to the defendant Weiss. The defendant Weiss objected to the same, and the Court overruled the objection, to which the said defendant Weiss duly Excepted. The documents were marked U. S. Exhibit 14 in evidence."

XI.

That the said District Court erred in giving the following instruction to the jury during the course of the examination of the witness Joseph N. Nathanson, as more fully appears from the record as follows, to-wit: [167]

"The Court: I will instruct the jury at the present time that pursuant to the authority given to him by statute, the Price Administrator on May 22, 1943, promulgated an Order No. 5 in which he fixed

the maximum prices for all sales by Ben Burke, Inc., Foster & Company, and American Distilling Company as follows: that on or after May 24, 1943, Ben Burke, Inc., Boston, Massachusetts, Foster & Company, New York City, and American Distilling Company, Beacon, Illinois, may sell and deliver to any person, and any person may buy and receive from those sellers Old Mr. Boston Rocking Chair Whiskey, a blend of straight Bourbon whiskies, 80.6 proof, aged as above, at the following prices: \$19.24—that is not in issue; that is another kind of whiskey?

Mr. Golvin: That is for pints.

The Court: \$15.37 plus \$3.87, being the amount of the increased Federal excise tax of November 1, 1942, applicable thereto, or a total of \$19.24 per case of 12 bottles, each bottle containing one-fifth gallon of such whiskey.

Now, do you wish to take an exception to that?

Mr. Friedman: Yes, your Honor. I wish to object to what your Honor has told the jury, and I ask your Honor to instruct the jury to disregard anything you have just read from the Federal Register or advised them about, upon the following grounds:

First, that the purported order is only an order that regulates processors of these particular distilled spirits; it has nothing to do with wholesalers; it has nothing to do with people who buy from [168] wholesalers or jobbers—that is the portion you have instructed the jury about—and therefore that this portion of the order is not binding upon Mr. Fei-

genbaum in this case, who is neither a processor nor a wholesaler of distilled spirits.

Secondly, upon the ground that the order on its face is in violation and in excess of the power conferred by the Emergency Price Control Act for these reasons: that under the Emergency Price Control Act the Administrator has the power by general order and by general order only to fix the prices of any commodity within a particular area or region, and that he has not the power and never was given the power by Congress to fix different prices for different people for the manufacture of the same kind of article, and this is a special order applicable only to certain people.

The Court: Do you propose to follow this up with further regulations with respect to the prices fixed for sale at wholesale?

Mr. Colvin: Yes, your Honor.

The Court: And this is preliminary to that?

Mr. Colvin: Yes, Your Honor.

The Court: I will overrule the objection, and an exception may be noted.

Mr. Duane: If the Court please, in behalf of the defendant Goldsmith I desire to offer the objection that this testimony and this regulation for this purpose is incompetent, irrelevant and immaterial. We are not here charged with any dealings with Burke or the American Distillery or anyone else.

The Court: I understand that.

Mr. Duane: We urge our objection on that ground.

The Court: I have instructed the jury as to

that regulation and overrule the objection upon the statement of the District Attorney that it is preliminary to showing a further price regulation for sales by wholesalers. There may be some connection there. I can't see that that would do any harm.

Mr. Friedman: I would ask your Honor to limit this testimony so that it does not go in as against the defendant Feigenbaum, who is not within either of the categories mentioned by Mr. Colvin.

Mr. Riordan: Before the Court rules on that may I for the record, for the defendant Blumenthal, adopt the objections made by Mr. Friedman and Mr. Duane, and object upon the further ground that it is an unlawful delegation of power in any event, also reiterating Mr. Friedman's objection particularly as to Mr. Blumenthal, that this is in no way binding upon the defendant Blumenthal as far as this evidence goes, because of the fact that there is no tie-in regarding any records here, everything that has been introduced at this time concerning it, I realize your Honor has that in mind.

The Court: I will instruct the jury that the instructions as to this order of the Price Administrator are now only being considered by the jury as against the defendant Goldsmith and if it is connected up with the other defendants it may be admitted later as to them. [170]

Mr. Duane: May I, then, in behalf of the defendant Goldsmith, your Honor, make this further objection: that the order referred to an order promulgated by the Office of Price Administration, and the Price Administrator, is invalid and void, and

that such order was adopted by the use of a delegation of power which of itself was invalid in this case.

The Court: ~~That objection will be overruled~~ and an exception noted.

Mr. Duane: Exception.

Mr. Riordan: "Exception."

to which rulings of the court said defendant Weiss also duly Excepted.

XII.

That the said District Court erred in permitting the witness Nathanson to give the following testimony and in overruling the following objections thereto, as appears from the record in the words and figures following, to-wit:

"(The Witness, Continuing): I am familiar with Maximum Price Regulation 445, published at 8 Federal Register 11161. That Regulation establishes the maximum price per case for the sale by a wholesaler of a case of twelve bottles, each of which twelve bottles contains one-fifth of one gallon of Old Mr. Boston Rocking Chair Whiskey, distilled by Ben Burke, Inc., said sales occurring during the months of December, 1943, and January, 1944, in this district and relating to transactions recorded in this freight bill which I have examined. Counsel for the defendant [171] Feigenbaum objected to the question on the ground that the Regulations were the best evidence. Thereupon, counsel for the Government, Mr. Colvin, stated that the

Maximum Price Regulation as to wholesale sales of distilled beverages in this district was not fixed by one single regulation but by formula, the first, or No. 5 under Maximum Price Regulation 193 which sets the maximum cost to the wholesaler at \$19.24, the second component being the local tax which arises under Section 24 of the California Alcoholic Beverage Act, which sets the price of twelve $1/5$ bottles of distilled beverage at \$1.92, and that the next element of the price arose from the actual freight charge which, in this case, was 81c. Counsel for the defendant Blumenthal objected to the statement upon the ground that counsel for the Government was stating evidentiary matter and assuming matters not in evidence. The Court stated that the jury should not take into account the statements of counsel as to the evidence unless satisfied that counsel was correctly stating the evidence, but that the Court assumed that Counsel for the Government was trying to explain the Regulations that fix the price, which was the price charged by the distiller to the wholesaler, plus the California Tax, plus the freight. Counsel for the Government stated that the statement of the Court was correct, and that, taking the three components, Regulation MPR 445, section 5.4, provided the multiplication of those component parts by 1.15 in order to establish the maximum wholesale price in this district, arising from the freight charge, the tax and the maximum cost to the wholesaler. [172]

Mr. Colvin: Mr. Nathanson, how do you calculate the price as to Old Mr. Boston Rocking Chair

Whiskey distilled by Ben Burke and Company for cases of fifths, which were shipped as recorded in the freight bills which are Government's Exhibits Nos. 7 and 8 in evidence? Counsel for the defendant Feigenbaum objected to the question but, before the objection was completed, the Court stated that the evidence was being admitted only as against the defendant Goldsmith. Counsel for defendant Goldsmith objected to the question upon the ground that the matter was one of calculation and that many persons would not understand how to make the calculation. The Court overruled the objection, to which ruling of the Court counsel for the defendants duly Excepted.

(The Witness, Continuing)⁶: The wholesaler's price to the retailer under Maximum Price Regulation 45 is based upon the percentage mark-up of 1.15 on his net cost. The net cost has three elements. The first is the net purchase price through November 2, 1942; the next item is the freight from the shipping point to the receiving point; the third element of cost is the State Excise Tax. In this instance the price from the distiller to the wholesaler through November 2, 1942, was \$19.24, because that reflects the increased taxes of November 1st, 1942. The freight to San Francisco per case is 81c. The State Excise Tax on a case of fifths, \$1.92, making a total of \$21.97. Then, we apply the percentage markup that is allowed the wholesaler, multiply that 1.15 or \$21.97, which gives the total sum of \$25.27 per case. That would be the price from the

wholesaler to the retailer FOB San Francisco for the particular merchandise." [173]

to the admission of the aforesaid evidence and the rulings aforesaid the Court duly allowed this defendant an Exception.

XIII.

That the said District Court erred during the examination of the witness Reinburg in admitting the following evidence overruling the objections thereto made by counsel for certain other defendants, to which rulings by virtue of the order of the said District Court the defendant Weiss was allowed an Exception:

"(The Witness Continuing):

During this period of time I traveled to San Francisco with Mr. Abel on two occasions. The first occasion was about the 6th or 7th of December. I took Mr. Abel with me in my car. I took him in the downtown section here about three or four blocks off Market, around Third or Fourth. The place was a jewelry store pawn shop, sports goods, I let Mr. Abel off at this sports goods shop. I had a conversation that I would pick him up there in half an hour. I drove down there on the date of the first trip at Mr. Abel's direction. He did not say to drive to this particular sports goods shop; he said 'up that street, down that street and stop here'.

Counsel for the defendants Abel and Blumenthal objected to this testimony; The Court overruled

the objection, to which ruling counsel for the said defendants duly Excepted.

(The Witness Continuing):

I subsequently, pursuant to the arrangement [174] which I had made, came back and picked Mr. Abel up and brought him back to Vallejo. I did not have a conversation with him regarding his trip to that place. I made a second trip to San Francisco with Mr. Abel about the 16th or 17th of December. I traveled to San Francisco the same way, in my car. I took him over and brought him back. I took him to the same section of the city, about three blocks off Market, about Third Street there. I observed Mr. Abel going in this pawn shop and sports shop, which I named. I did not have any conversation with him regarding taking him to that place on the way down; just that I would meet him there. He said he would meet me at the same place, dropping him off at the same place, that was all. I picked him up about a half hour later and brought him back to Vallejo, just as I did before. In the meantime I was around town, just waiting. I made more trips to San Francisco during the month of December. I came over and tried to get some more whiskey without paying that price. I went to the Francisco Distributing Company. That was around the 10th of December. It was after the first trip I made and before the second one to the Francisco Distributing Company. The same man was behind the counter. He wouldn't give me any business at all. I do not see that man in the court room. I did

not make a purchase of any whiskey at that time. After visiting there, I went down to the pawn shop where I left Mr. Abel off on the first occasion of my trip to San Francisco. I went into the pawn shop. I tried to do business with whiskey and nobody talked to me. They weren't interested. I do not remember what person I saw in that pawn shop. I was unable to do any business at the pawn shop. [175] They did not say that they sold whiskey there. They didn't know what I was talking about. At that time I returned to Vallejo."

XIV.

That the said District Court erred in overruling the following objections during the examination of the witness John Giometti, and in overruling the following objections made by counsel for certain of the other defendants, to which rulings and to the admission of the testimony admitted thereby, the defendant Weiss by virtue of the aforesaid order of the Court, was allowed an Exception:

"I have the Owl Cafe, 121 Georgia Street, Vallejo, California, and hold a liquor license at those premises. I was in that business during the month of December, 1943, and the month of January, 1944. During those months, I purchased some Old Mr. Boston Rocking Chair Whiskey from the Francisco Distributing Company. I paid \$65 a case for that whiskey. I gave a check to Norman Reinburg and the cash, and he got me the whiskey.

Counsel for the defendants Blumenthal and Feigenbaum objected to the evidence as not binding

upon the said defendants, and the Court stated that it was admitted only as against the defendant Goldsmith. Counsel for the defendant Goldsmith objected upon the ground that there was no foundation for the testimony as to the defendant Francisco Distributing Company, and no evidence containing it, so that the witness Reinburg repeated the same, and the Court struck out the testimony of the witness that he made the purchase from the Francisco Distributing Company. [176]

(The Witness Continuing):

I purchased 50 cases of Old Mr. Boston Rocking Chair Whiskey. I had the conversation regarding the purchase of the whiskey with Norman Reinburg. The conversation took place early in December of 1943—say the 6th or 7th. Just Mr. Reinburg and I were present. The conversation took place at Norman Reinburg's place of business. Subsequent to that conversation, 50 cases of Old Mr. Boston Rocking Chair Whiskey were delivered to me, I would say, in February, 1944. I seen the invoice now shown me entitled 'Francisco Distributing Company No. 10171'. I saw that when I got the delivery of the whiskey. The Kellogg Express Company gave me the bill and the invoice; that invoice was kept by me as a record of my business directly under my care and custody. That is the shipping bill to which I have referred. The shipping bill and the invoice were delivered to me together. The said invoice was marked U. S. Exhibit 24 for identification and the shipping bill, U. S. Exhibit 25 for identification. I gave the check

and the cash for the whiskey to Norman Reinburg. The check was made out to Francisco Distributing Company. It is not in my possession. I got this cashier's check from the Bank of America and paid \$1,225 for it. I gave the check to Mr. Norman Reinburg.

Q. At that time, did you give any cash to Norman Reinburg?

Counsel for the defendants Goldsmith, Abel and Feigenbaum objected to the question upon the ground that the evidence was not binding upon the said defendants. The court overruled the said objection, to which ruling of the Court counsel for the defendants duly Excepted. [177]

The Witness: I gave him the balance of the \$65 a case.

(To the Court): \$2,025.

Subsequent to that time I had a conversation with Mr. Louis Abel regarding this transaction. I would say the conversation took place after I received the first shipment, I would say a couple of months after I received the whiskey previously. He had a jewelry store in front of Mr. Norman Reinburg's place. The conversation took place inside of the jewelry store. Beside Mr. Abel and myself, some fellow was present representing Hart's Distributing Company. That is a liquor company.

Mr. Colvin: Q. What was that conversation with Mr. Abel regarding your purchase of this whiskey?

Counsel for the defendants Goldsmith and Abel objected to the question, the former on the ground

that it was incompetent, irrelevant and immaterial, and counsel for the defendant Abel objecting upon the same ground and upon the further ground that it was not within the issues of the subject-matter of the conspiracy charged in the indictment, for the reason that anything that the defendant Abel may have said, if it was subsequent to the conclusion of the transaction, would not be within the issues, and would not be competent or pertinent after the transaction had been concluded. The Court overruled the said objection, to which ruling counsel for the said defendants duly Excepted.

The Witness: He said he could get me some whiskey if I wanted to get it, and he said he could probably get it a little cheaper, and in that way— [178] well, he said he would save me \$5 a case; \$60 a case, so I told him I paid \$65 a case for it once, and I wouldn't go for it again. That was all that was said. He said the whiskey I got at Francisco Distributing Company went through his hands, and he could get me the same deal. He said he just took the money I gave Norman Reinburg, the money I gave to Norman Reinburg was given to him, and he took it to the 'big shot', and he could get me the figure of \$60 a case, and I wouldn't go for it no more because I figured I was paying too much for it in the first place, and I didn't think I would get a legitimate bill. He did not say who the 'big shot' was. He said the 'big shot' was in San Francisco."

XV.

That the said District Court erred during the examination of the witness Victor Figone, in denying the motion to strike out the following testimony:

"During the month of December, 1943, I made a purchase of Old Mr. Boston Rocking Chair Whiskey. I purchased the whiskey from some gentleman in the Francisco Distributing. I understood that the man's name was Weiss."

to which ruling the defendant Weiss duly Excepted.

XVI.

That the said District Court erred in denying the motion to strike out all of the testimony of the witness Milton Avila on the ground that the same was hearsay, to which ruling defendant Weiss was allowed an Exception.

XVII.

That the said District Court erred in overruling the [179] following objection, and in admitting the following testimony during the examination of the witness James Cermusco:

"Mr. Colvin: Q. At whose direction did you stop at that place on Third Street?

Mr. Riordan: I object to that as incompetent, irrelevant and immaterial as to the defendant Blumenthal. We are not bound by any directions.

The Court Overruled the said Objection of Mr. Riordan, to which counsel for the defendant Blumenthal Excepted.

*The Witness (to the Court):

The man who was driving the car stopped there. He was the man who said he came from the Francisco Distributing Company. I have seen the check now shown me, entitled, 'Livermore Office, American Trust Company,' made out to the Francisco Distributing Company for \$450. I had this one myself. I got it from Mr. Vukota. I had given that check to the man who said he was from the Francisco Distributing Company. I gave one of these checks to that man in the early part of December, and one was in the early part of January. I gave one of these checks to that man on the day I took the ride along Third Street with him. I didn't give him the money on Third Street, though. We then drove, from Third Street, we went down around Market, we came back around Second Street, and then we went down near Townsend Street. Right there we parked the car and I gave him the money. I gave him the check for \$450. The check for \$2,000 was given to him the early part of December."

To the above ruling of the Court, the defendant Weiss was allowed an Exception. [180]

XVIII.

That the said District Court erred in admitting over the stated objection of defendant Weiss the following testimony:

"Q. What conversation did you have with Mr. Feigenbaum on that date regarding the whiskey?

Mr. Friedman: I will object to that on the

ground that it is incompetent, irrelevant and immaterial; the proper foundation is not laid. We have no proof of the corpus delecti, or any fact, act, statement or declaration of any alleged co-conspirator.

The Court: Objection overruled. Exception noted."

Pursuant to the order of the Court heretofore referred to, this exception was deemed to be an Exception by the defendant Weiss.

(The Witness Continuing): I had a conversation with him. I asked him, 'Where is our whiskey?' We were worried about it. We hadn't heard anything from this liquor. So he told us it would be in soon, and it would be shipped to us. At that time he told me the name of the whiskey was The Old Rocking Chair, and he showed me a bottle he had in his desk drawer. That was a fifth. I did not open the bottle there. I asked him what kind of whiskey it was, and how good it was, and I made a deal with him then to buy a case of whiskey to take down to Los Angeles with me. That was in addition to the other purchases. I paid him \$64 for that case in cash. I told him I would take the 100 cases, and he wrote a check out to me, H. L. Taylor, and I endorsed it back to him. He wrote a [181] check to me for \$2450. He asked me to endorse that so that I would put him in the clear.

(To the Court): That would give us, instead of taking 200 cases, which we were billed for, the \$4900. That would give us just the 100 cases for

\$64 a case, so he wrote the check for \$2450, and had me endorse it back to him. He signed that check in my presence. I did not receive any cash for it when I endorsed it. I told him I had to be going, I was going to Los Angeles, and we wanted to get our whiskey as quick as we could. We gave him instructions previous to that. I had no subsequent dealings with him."

XIX.

That the said District Court erred in admitting over the objection made thereto, the following testimony of the witness Ruth Taylor:

"I have seen this check to Francisco Distributing Company for \$4,900 now shown me. That is my check, and that is my signature that appears thereon. I wrote that check myself on December 9, 1943 in the Sunset Drugstore in the rear of the drugstore. At that time, my husband, Mr. Humes and Mr. Feigenbaum, and a man named Mr. Tucker and another fellow they call Little Joe were present. I wrote that check at Mr. Feigenbaum's instructions. He told me to whom to make the check payable. He told me the amount for which I was to write the check. I did not witness the payment in cash of any money to Mr. Feigenbaum on that occasion. I had given my husband the money, but didn't [182] see him present it to Mr. Feigenbaum. At that time I had given my husband a certain amount of cash after he had parked in front of the drugstore. (here) \$1,000 in hundred dollar and fifty dollar bills. I happened to have the cash with

me, and I gave it to him. There was a discussion about writing the check.

Q. What was that discussion?

Mr. Friedman objected to the question on the ground that it was immaterial and irrelevant as against the defendant Feigenbaum, and that it called for acts, declarations and transactions participated in and performed by defendant Feigenbaum when the substance of the offense charged had not yet been established.

The Court overruled the objection, to which counsel for the defendant Feigenbaum duly Excepted."

To this ruling the defendant Weiss, by virtue of the order aforesaid was allowed an Exception.

XX.

That the said District Court erred in admitting over the *objected* stated thereto the following testimony of the witness Humes;

"Q. What was that conversation you had with Mr. Feigenbaum?

Mr. Friedman objected to the question upon the ground that it called for the act or declaration of payment on the part of the alleged co-conspirator in the case, and that there had been no proof of the corpus delicti.

The Court overruled the said objection, to which counsel for the defendant Feigenbaum duly excepted. [183]

(The Witness Continuing):

We were introduced to Mr. Feigenbaum by Little

Joe and Mr. Feigenbaum wanted to know what we would have, and we told him we wanted 100 cases of whiskey. He said, 'Yes, I think I can get it for you'. Nothing was said about the deposit right at that time. He said he would get us 100 cases of whiskey, and he would have a check for it for \$24.50 a case. He told us that the whiskey would cost us altogether \$64 a case. It was then that I had the discussion about the \$500 I had paid. He said it was a good thing we got down on that date or we would have forfeited the \$500. Mr. Feigenbaum said that. We had a conversation then about the number of cases we were going to take. We were talking about 100 and Feigenbaum wanted to know if we couldn't take 200. I thought it was a little too steep for myself and I said that. Then Mr. Taylor and him and I got talking about how we could use the 200 so we were to make out the check for 200 cases, which was \$4,900. The check for \$4,900 was made out after our statement that maybe, we could take 200. We asked him about the whiskey, if we could take the whiskey up on a truck with us to Cottonwood. He said the whiskey wasn't in. He said it would be about a week or ten days, that the whiskey would come in on a car, and that they would send it up by truck. If not, we would receive it by freight. We asked him where the distributor was, and he didn't say. He asked fifty cents a case to pay for the freight. He was paid an amount of money for the freight in addition to the \$500 deposit and the check for \$4,900. He was paid the further amount

of \$1,050. Mr. Taylor paid that money to Mr. Feigenbaum in my presence. Mr. Feigenbaum [184] then said he wanted a check for \$24.50. He said that went to the distributor. He said we would have to come through with \$1,050 in cash. I think that is about all the discussion at that time."

To this ruling, the defendant Weiss, by virtue of the order aforesaid, was allowed an exception.

XXI.

That the said District Court erred in admitting over the objection stated, the following testimony of the witness Vogel:

"Q. Did you give any cash to this man in addition to this check?

Counsel for the defendant Goldsmith objected to the question as being without foundation.

The Court overruled the said objection, to which counsel for the defendants Goldsmith and Feigenbaum duly excepted, and the Court allowed an exception as to all the defendants.

(The Witness continuing):

I did not give any cash at that time to this man when I gave him the check. After he brought me the bills, I gave him the cash. He told me I would have to pay him for getting the whiskey. I have seen this document entitled, 'Francisco Distributing Company, No. 10092'. I received this document from that man about an hour and a half or two hours after I gave him the check; he came back with this. Both of these transactions took place

on the same day, which was December 6, 1943. When he came back about one hour and a half later, I am sure he was the man to whom [185] I had given the check. I think I gave him \$3,400 in cash. I paid \$24.50 for the whiskey. That was for 100 cases. (To the Court): I mean, \$2,450, or \$24.50 a case for 100 cases. We talked about the whiskey. That took place in my place of business about four o'clock. There was no one present beside this man and myself. He asked me if I wanted to buy whiskey. I said yes, I needed whiskey very bad. He asked me how many cases. I said, 'Well, how many can you get for me'. I thought he was going to say 10 cases, but he said, 'I can get 100 cases'. I said, 'All right, I will take 100 cases', so I asked him how much is it, a case. He said, 'It is \$24.50 a case', I said, 'Is that all'. I thought it was kind of cheap. So he said, 'Well, that is all for the whiskey'. But he said, 'Now, then, you have to pay me for getting the whiskey for you'. So then he told me to make him out a check for the whiskey. I think he wanted the cash, and I wouldn't give him the cash until he brought back the bill, so he brought back the bill. I gave him the cash that he asked. I think it is \$3,400. We figured it out later. The whiskey stood me \$59 a case. I did not have a conversation about the ceiling price with him. He told me to make out the check to the Francisco Distributing Company for \$2,450. I subsequently received 100 cases of Old Mr. Boston Rocking Chair Whiskey in cases of fifths. I checked the shipment after it

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arrived in the warehouse. I kept it in the San Francisco Warehouse Company. I would draw on it two or three cases at a time. It was put in my name, and I paid the storage. It was left in the warehouse in my name. I wouldn't say the man who sold me the whiskey was a heavy-set man. He was [186] about a man of medium build. As I remember, he was a dark-complected man. I didn't notice any peculiarities of speech that he had, or any other outstanding physical characteristics."

XXII.

That the said District Court erred, in admitting over the objection stated, the following testimony of the witness Harkins:

"I had one conversation later than January, 1944, with Mr. Weiss, on May 14, in this building. Beside myself and Mr. Weiss, Mr. Colvin was present.

Q.. What was that conversation?

Mr. Weiss, in his own proper person, objected to the question on the ground that it was subsequent to the termination of the conspiracy, and hearsay, and that the corpus delicti had not been established. The Court Overruled the Objection, to which the said defendant duly Excepted.

The Witness (continuing): Mr. Weiss. stated that it was true that he received half of the \$2 commission paid to the Francisco Distributing Company for clearing this whiskey through their books, and he finally refused to answer who actually owned the whiskey. He said, 'I don't want to

involve myself.' Mr. Weiss said he knew Mr. Blumenthal, but he refused to state, to the best of my recollection, positively, whether Mr. Blumenthal was the owner of the whiskey or not."

XXIII.

That said District Court erred in overruling the objections to the admission of all the evidence and exhibits [187] in the case against all the defendants, which said objections and motions, and the specific grounds therefor, were stated by Mr. Friedman, counsel for the defendant Feigenbaum, and were adopted by this defendant Weiss, which said objections and motions, and the said rulings of the Court thereon from the record and proceedings herein fully and at large appear, and are fully set forth in Feigenbaum's assignment of error XVII and to which rulings of the Court thereon, this defendant Weiss duly Excepted.

XXIV.

That the said District Court erred in denying the following motion for a directed verdict of not guilty made by the defendant Weiss at the conclusion of the Government's case, as appears from the record as follows, to-wit:

"The Court: Very well. The record will so show.

Mr. Weiss: I ask the Court if the record might show that I adopt the motions as made by Mr. Friedman, Mr. Dunne, Mr. Wolff, and Mr. Riordan. I would also like to urge this course specifically as to the testimony of Mr. Victor Figone, who was

the only witness in this case whose testimony, if true, would have shown some conspiracy with the others in this particular case. However, the record will show what the testimony of Mr. Figone is, or was, and I would ask the Court to dismiss the case and grant the motion for a directed verdict."

XXV.

That the evidence was, and is, insufficient, as a matter of law, to support or justify the verdict of the jury.

XXVI.

That the indictment does not charge any crime or offense, or any conspiracy to commit any crime or offense [188] against the United States of America, or any conspiracy to violate any Regulation of the Price Administrator issued or adopted under the powers conferred upon him by the Emergency Price Control Act (U. S. C. A., Title 50, Appendix), and that by reason thereof, the said District Court had no jurisdiction of the said cause, or to try this defendant thereon, or to pass judgment or sentence therein on this defendant.

Wherefore, said defendant Samuel S. Weiss prays that the aforesaid judgment and sentence of the said District Court be reversed, and that he go hence sine die.

Dated: July 20, 1945.

(Signed) SAMUEL S. WEISS

In Propria Persona

(Acknowledgment of Service.)

[Endorsed]: Filed July 21, 1945. [189]

[Title of Court and Cause.]

ASSIGNMENT OF ERRORS OF DEFENDANT
LAWRENCE B. GOLDSMITH

Now Comes Lawrence B. Goldsmith, one of the defendants and appellants in the cause numbered and entitled as above, who has heretofore appealed to the United States Circuit Court of Appeals for the Ninth Circuit from the judgment and sentence given, made and entered against him in said cause in and by the said District Court, and, having duly given his notice of appeal in the manner and form provided by law, and by the Rules adopted and promulgated by the Supreme Court of the United States governing appeals in criminal cases, files this, his assignment of the errors upon which he will rely for a reversal of the judgment and sentence aforesaid, and says, that in the record and proceedings aforesaid, as also in the judgment of the plea herein, manifest error hath happened to the grievous damage of him, the said Lawrence B. Goldsmith, in each and every of the following particulars, to-wit:

I.

That the indictment on file in the above entitled cause does not state facts sufficient to constitute any crime or offense against the United States of America.

II.

That the said indictment does not state facts sufficient to charges this defendant, Lawrence B. Goldsmith, with any crime or offense against the United States of America.

III.

That the said indictment does not state facts sufficient to charge this defendant, Lawrence B. Goldsmith, with any conspiracy to commit any crime or offense against the United States of America.

IV.

That said indictment is upon its face a nullity, in this, to-wit, that it alleges that the defendants therein named, [191] conspired, confederated and agreed with, and among themselves, and with divers persons to the grand jurors unknown, to violate certain regulations adopted by the Price Administrator and that it appears upon the face thereof that one of the said price regulations at the times mentioned in the said indictment, had been repealed and superseded, and that the other price regulation therein named, had not been adopted or issued, and was not in effect at any of the times in the indictment set forth.

V.

That said indictment does not charge this defendant with any crime, or offense, or with any conspiracy to commit any crime, or offense against the United States of America, and is, therefore, a nullity, and for the further reason that a conspiracy to violate a price regulation issued and adopted by the Price Administrator is punishable as a misdemeanor under the provisions of section 925-B of Title 50, U.S.C.A., and is not indictable or punishable as a felony under the provisions of section 88 of Title 18, U.S.C.A.

VI.

That the said indictment is void, and the conviction of this defendant thereon, a nullity, and that the said District Court had no jurisdiction to hear and determine the same, or to try this defendant thereon, or to render judgment against this defendant, and that the verdict of the jury in the cause entitled above was, and is, null and void for the reason that Maximum Price Regulation 193 and 445 were, and are, and each of said Regulations was, and is, so indefinite, vague, and uncertain, that no person of common understanding reading the said regulations, or either of them, could know or ascertain what act or acts, were prohibited thereby.

VII.

That, by reason of the matters and things set forth in the next preceding paragraph, the conviction of this defendant, Lawrence B. Goldsmith, upon the said indictment and the judgment and sentence pronounced against him upon said conviction, violated the provision of the Fifth Amendment to the Constitution of the United States that no person shall be deprived of life, liberty, or property, without due process of law.

VIII.

During the course of the trial, evidence was offered which in terms and on its face applied to only one defendant or only to certain defendants or was claimed to so apply. At the time said evidence was so received, it was admitted only as against the defendant as to whom, in terms, it was applied and

only as against the defendant with whom the witness so testifying dealt, or was claimed to have dealt. At the close of all of the evidence, the Government moved that all of the testimony and evidence admitted as against any defendant be admitted as against all defendants, and that all documents theretofore marked for identification be admitted as against all defendants. Said motion was opposed by defendant Lawrence B. Goldsmith upon the grounds that the evidence was incompetent, irrelevant and immaterial, was without foundation, was evidence of acts and declarations of persons other than said defendant, not made in the presence of said defendant and not connected with him, and was hearsay and that the corpus delicti of the conspiracy had not been established and that there was no evidence to show that the defendant Lawrence B. Goldsmith was a member of any conspiracy. [193] The said district court erred in granting the said motion of the Government over the said objection of defendant Lawrence B. Goldsmith, to which ruling said defendant duly excepted. All of the said matter more fully appears from Defendants' Bill of Exceptions herein, in which the grounds of objection as to the items of evidence were specific and detailed and since said motion and objections went to substantially all of the evidence in the case, all set out at length in said Bill of Exceptions, reference is hereby made to said bill of exceptions for a statement of said evidence, and the same is incorporated as a part of this assignment.

IX.

That the said distriet court erred in denying the motion of this defendant at the conclusion of the Government's case, that the court instruct the jury to find this defendant not guilty, upon the ground that there was no evidence that this defendant was party to any conspiracy, that the evidence is insufficient to support a verdict or judgment of guilty as to defendant Goldsmith, the offense sought to be charged in the indictment has not been proved, that the conspiracy alleged has not been proved, that the evidence does not exclude every other reasonable hypothesis except guilty so far as defendant Goldsmith is concerned, and is as consistent with his innocence as with his guilt and that the only evidence tending to establish the alleged conspiracy or defendant Goldsmith's connection therewith consists of extra-judicial acts and declarations of third persons unknown to said defendant and not in his presence and without his consent, or statements or acts attributed to him without independent proof of the corpus delicti, to which ruling and order of the court defendant Lawrence B. Goldsmith [194] duly excepted, all as more fully appears from Defendants' Bill of Exceptions.

X.

That the District Court erred in denying the motion of defendant Lawrence B. Goldsmith after the conclusion of all of the testimony in evidence, and after both sides had rested the case, for an instructed verdict of not guilty as to said defendant Lawrence B. Goldsmith, made on all of the grounds

stated in Assignment IX above, to which ruling and order of the court counsel for defendant Lawrence B. Goldsmith duly excepted, as more fully appears from Defendants' Bill of Exceptions.

XI.

That the said District Court erred in denying the motion of said defendant Lawrence B. Goldsmith, for a new trial, to which ruling and order of the said District Court counsel for this defendant Lawrence B. Goldsmith duly excepted, all as more fully appears from Defendants' Bill of Exceptions.

XII.

That the said District Court erred in denying the motion of the said defendant Lawrence B. Goldsmith, in arrest of judgment, to which order and ruling of said District Court counsel for said defendant Lawrence B. Goldsmith duly excepted, all as more fully appears from Defendants' Bill of Exceptions.

XII.

That the said District Court, upon the trial of said cause, erred in admitting in evidence over the objection of counsel for said defendant that the same was incompetent, irrelevant and immaterial and not within the issues, "U. S. Exhibit 2," the said exhibit being a document entitled "Wholesale [195] Liquor Dealers Monthly Report Summary of Forms 52-A and 52-B," showing the purchases of the Francisco Distributing Company during the month of December, 1943, as kept in the records of the United States Internal Revenue Department, to

which ruling of the court, counsel for the said defendant Lawrence B. Goldsmith, then and there duly excepted.

XIV.

That the said District Court, upon the trial of said cause, erred in admitting in evidence over the objection of counsel for said defendant, being the same objection made to "U. S. Exhibit 2," "U. S. Exhibit 3," the said exhibit being a document entitled "Wholesale Liquor Dealers Monthly Report Summary of Forms 52-A and 52-B," showing the purchases of the Francisco Distributing Company during the month of January, 1944, as kept in the records of the United States Internal Revenue Department, to which ruling of the court counsel for said defendant Lawrence B. Goldsmith then and there duly excepted.

XV.

That the said District Court erred in admitting in evidence over the objection of counsel for the said defendant Lawrence B. Goldsmith that the same and each was, incompetent, irrelevant and immaterial and without foundation and no part of the res gestae, "U. S. Exhibits 4, 5 and 6," the same being the so-called 52-A and 52-B records of the Francisco Distributing Company which had been filed with said United States Internal Revenue Department from the month of March, 1942, to the month of December, 1943, to which ruling of the court, counsel for the said defendant Lawrence B. Goldsmith then and there duly excepted. [196]

XVI.

That the said District Court erred in denying the motion of the said defendant Lawrence B. Goldsmith, to strike out the following testimony of the witness Fred A. Sander:

"1426 cases were delivered from the car on arrival." Upon the ground that the same was incompetent, irrelevant, immaterial and hearsay, to which ruling of the court counsel for the said defendant Lawrence B. Goldsmith then and there duly excepted.

XVII.

That the said District Court erred in overruling the objection of counsel for the said defendant Lawrence B. Goldsmith to the following testimony of the witness Fred A. Sander:

"Q. Mr. Sander, who, if anyone, instructed you regarding the unloading of the two freight cars whose numbers appear in your records?"

Counsel on the grounds the same was incompetent, irrelevant and immaterial and assumed something not in evidence, [197] and in permitting the witness to answer the said question as follows, to-wit:

"The instructions came through a Mr. Weiss, representing himself as Francisco Distributing Company. Mr. Weiss personally gave me those instructions. I held a conversation with Mr. Weiss covering the unloading of these cars. The conversation took place to the best of my knowledge at our office. The date of the conversation was on or about December 15, 1943. Nobody was present besides Mr. Weiss and myself."

to which ruling of the court, counsel for the said defendant, Lawrence B. Goldsmith, then and there duly Excepted.

XVIII.

That the said District Court erred in admitting in evidence the following testimony of the said witness Sander with reference to the conversation referred to in the last assignment, to-wit:

“Q. What was the content of this conversation relating to those shipments?”

Counsel for the defendant Goldsmith objected to the question on the ground that it was incompetent, irrelevant and immaterial, hearsay, no part of the res gestae so far as the defendant Goldsmith was concerned; and not within the issues of the charge of conspiracy as far as the defendant Goldsmith was concerned, and asked the court that if the conversation was related, that the jury be instructed to disregard the statement as to the defendant Lawrence B. Goldsmith. The Court stated that it would not instruct the jury to disregard the statement, to which ruling of the Court counsel for the defendant Goldsmith duly Excepted. [198]

“(The Witness Continuing:)

Mr. Weiss came in to ask us if we could handle the cars or distribution for him, and after a little consultation about it in our distributing office we finally agreed to accept the car for him and distribute it and asked him to give us his address. He said he would arrange to have them down to us. I subsequently received certain orders from Mr.

Weiss. They are all together here in the file. This is the merchandise which was delivered ex car 1426 cases. When I refer to 'this car' I mean that car for which receipt was dated December 7, 1943. The number of that car was PRR 568,500."

XIX.

That the said District Court erred in admitting in evidence over the objection of the defendant Goldsmith, the testimony of the said Witness Sander as to statements made to the said Witness by the defendant Weiss out of the presence of the said defendant Goldsmith, and in stating, "The conversation of the defendant Weiss may be admitted as against both the defendants Goldsmith and Weiss," to which ruling of the Court, counsel for the defendant Goldsmith duly Excepted.

XX.

That the said District Court erred in admitting in evidence over the objection of counsel for the defendant Goldsmith that the same was incompetent, irrelevant and immaterial, and no foundation had been laid, a certain document, entitled "San Francisco Warehouse Company, 625 Third Street," dated, "San Francisco, December 17, 1943," for account of Francisco Distributing Company, Warehouse No. 6, PRR 568500, as U. S. Exhibit 9 being the record of the witness Sander, of the receipt of 650 cases of Old Mr. Boston Rocking Chair Whiskey, to which ruling counsel for the defendant Goldsmith duly Excepted. [199]

XXI.

That the said District Court erred in admitting in evidence over the objection of counsel for the defendant Goldsmith on the grounds stated in assignment XX, "U. S. Exhibit No. 9," which said exhibit was a document purported to represent the receipt of 650 cases of whiskey from Pennsylvania Railroad, Car PRR 568500, to which ruling, counsel for the defendant Goldsmith duly Excepted.

XXII.

That the said District Court erred in overruling the objection of counsel for the defendant Goldsmith to the following testimony given by the witness Sander upon the ground that the same was incompetent, irrelevant and immaterial, and called for the opinion and conclusion of the witness, and was hearsay as to the defendant Goldsmith:

"I can identify this sheaf of invoices now shown to me. These are car instructions which is headed Francisco Distributing Company, to deliver various lots of cased distilled spirits of Old Mr. Boston Rocking Chair to the respective people, customers of theirs, I presume, in the amount of 1426 cases."

XXIII.

That the said District Court erred in admitting in evidence over the objection of the defendant Goldsmith the following evidence, oral and documentary, during the testimony of the witness Sander:

"These papers were handed to me by Mr. Weiss at our office, 625 Third Street, San Francisco. We

did not have the cars in our possession. We had advised Mr. Weiss to pay the freight, surrender the bills of lading, so we could get the cars into the [200] warehouse. We subsequently got possession of the merchandise in these cars and made delivery of it in accordance with these documents."

Thereupon, the Court admitted the document (U. S. Exhibit 10) in evidence, to which ruling counsel for defendant Goldsmith duly Excepted.

XXIV.

That the said District Court erred during the direct examination of the witness Frank Dito, in admitting in evidence the following testimony, and in making the following rulings, to-wit:

"Q. Did Mr. Goldsmith visit the bank with reference to this transaction?"

Counsel for the defendant Goldsmith objected to the question upon the ground that it was leading and suggestive. The Court overruled the said objection, to which ruling counsel for the defendant Goldsmith duly Excepted.

"Mr. Colvin:

Q. What happened, Mr. Dito?

A. The draft was paid. Mr. Goldsmith directed that the draft should be paid. Mr. Goldsmith directed me that the draft named in Government's Exhibit No. 17 be paid. I had no dealings with Mr. Weiss during that period of time. Subsequent to that direction, the account of the Francisco Distributing Company was charged with the amounts

of the two drafts and the sight drafts were released to Mr. Goldsmith."

XXV.

That the said District Court erred in giving the [201] following instruction to the jury during the course of the examination of the witness Joseph N. Nathanson, as more fully appears from the record as follows, to-wit:

"The Court: I will instruct the jury at the present time that pursuant to the authority given to him by statute, the Price Administrator on May 22, 1943, promulgated an Order No. 5 in which he fixed the maximum prices for all sales by Ben Burke, Inc., Foster & Company, and American Distilling Company as follows: That on or after May 24, 1943, Ben Burke, Inc., Boston, Massachusetts, Foster & Company, New York City, and American Distilling Company, Beacon, Illinois, may sell and deliver to any person, and any person may buy and receive from those sellers, Old Mr. Boston Rocking Chair Whiskey, a blend of straight Bourbon whiskies, 80.6 proof, aged as above, at the following prices: \$19.24—that is not in issue; that is another kind of whiskey?

Mr. Colvin: That is for pints.

The Court: \$15.37 plus \$3.87, being the amount of the increased Federal excise tax of November 1, 1942, applicable thereto, or a total of \$19.24 per case of 12 bottles, each bottle containing one-fifth gallon of such whiskey.

Now, do you wish to take an exception to that?

Mr. Friedman: Yes, your Honor. I wish to object to what your Honor has told the jury, and I ask

your Honor to instruct the jury to disregard anything you have just read from the Federal Register [202] or advised them about, upon the following grounds:

First, that the purported order is only an order that regulates processors of these particular distilled spirits; it has nothing to do with wholesalers; it has nothing to do with people who buy from wholesalers or jobbers—that is the portion you have instructed the jury about—and therefore that this portion of the order is not binding upon Mr. Feigenbaum in this case, who is neither a processor nor a wholesaler of distilled spirits.

Secondly, upon the ground that the order on its face is in violation and in excess of the power conferred by the Emergency Price Control Act for these reasons: That under the Emergency Price Control Act the Administrator has the power by general order and by general order only to fix the prices of any commodity within a particular area or region, and that he has not the power and never was given the power by Congress to fix different prices for different people for the manufacture of the same kind of article, and this is a special order applicable only to certain people.

The Court: Do you propose to follow this up with further regulations with respect to the prices fixed for sale at wholesale?

Mr. Colvin: Yes, your Honor.

The Court: And this is preliminary to that?

Mr. Colvin: Yes, your Honor.

The Court: I will overrule the objection, and an exception may be noted.

Mr. Duane: If the Court please, in behalf of [203] the defendant Goldsmith I desire to offer the objection that this testimony and this regulation for this purpose is incompetent, irrelevant and immaterial. We are not here charged with any dealings with Burke or the American Distillery or anyone else.

The Court: I understand that.

Mr. Duane: We urge our objections on that ground.

The Court: I have instructed the jury as to that regulation and overrule the objection upon the statement of the District Attorney that it is preliminary to showing a further price regulation for sales by wholesalers. There may be some connection there. I can't see that that would do any harm.

Mr. Friedman: I would ask your Honor to limit this testimony so that it does not go in as against the defendant Feigenbaum, who is not within either of the categories mentioned by Mr. Colvin.

Mr. Riordan: Before the Court rules on that may I for the record, for the defendant Blumenthal adopt the objections made by Mr. Friedman and Mr. Duane, and object upon the further ground that it is an unlawful delegation of power in any event, also reiterating Mr. Friedman's objection particularly as to Mr. Blumenthal, that this is in no way binding upon the defendant Blumenthal as far as this evidence goes, because of the fact that there is no tie-in regarding any records here, every-

thing that has been introduced at this time concerning it, I realize your Honor has that in mind.

The Court: I will instruct the jury that the instructions as to this order of the Price Administrator [204] are now only being considered by the jury as against the defendant Goldsmith and if it is connected up with the other defendants it may be admitted later as to them.

Mr. Duane: May I, then, in behalf of the defendant Goldsmith, your Honor, make this further objection: that the order referred to an order promulgated by the Office of Price Administration, and the Price Administrator, is invalid and void, and that such order was adopted by the use of a delegation of power which of itself was invalid in this case.

The Court: That objection will be overruled and an exception noted.

Mr. Duane: Exception.

Mr. Riordan: Exception."

XXVI.

That the said District Court erred in permitting, upon the direct examination of the witness John Giometti, the introduction of the following evidence, and in making the following rulings, to-wit:

"Q. At that time, did you give any cash to Norman Reinburg?"

Counsel for the defendants Goldsmith, Abel and Feigenbaum objected to the question upon the ground that the evidence was not binding upon these said defendants. The court overruled the said

objection, to which ruling of the Court counsel for the defendants duly Excepted.

"The Witness: I gave him the balance of the \$65 a case.

(To the Court): \$2,025. [205]

"Subsequent to that time I had a conversation with Mr. Louis Abel regarding this transaction. I would say the conversation took place after I received the first shipment, I would say a couple of months after I received the whiskey previously. He had a jewelry store in front of Mr. Norman Reinburg's place. The conversation took place inside of the jewelry store. Beside Mr. Abel and myself, some fellow was present representing Hart's Distributing Company. That is a liquor company.

Mr. Colyin: Q. What was that conversation with Mr. Abel regarding your purchase of this whiskey?

Counsel for the defendants Goldsmith and Abel objected to the question, the former on the ground that it was incompetent, irrelevant and immaterial, and counsel for the defendant Abel objecting upon the same ground and upon the further ground that it was not within the issues of the subject-matter of the conspiracy charged in the indictment, for the reason that anything that the defendant Abel may have said, if it was subsequent to the conclusion of the transaction, would not be within the issues, and would not be competent or pertinent after the transaction had been concluded. The Court overruled the said objection, to which ruling counsel for the said defendants duly Excepted.

The Witness: He said he could get me some whiskey if I wanted to get it, and he said he could probably get it a little cheaper, and in that way—well, he would save me \$5 a case; \$60 a case, so I told him I paid \$65 a case for it once, and I wouldn't go for it again. That was all that was said. He said the whiskey I got at Francisco [206] Distributing Company went through his hands, and he could get me the same deal. He said he just took the money I gave Norman Reinburg, the money I gave to Norman Reinburg was given to him, and he took it to the "big shot," and he could get me the figure of \$60 a case, and I wouldn't go for it no more because I figured I was paying too much for it in the first place, and I didn't think I would get a legitimate bill. He did not say who the "big shot" was. He said the "big shot" was in San Francisco.

XVII.

That the said District Court erred in overruling the objection to testimony of defendant Goldsmith and admitting testimony, and denying the motion of defendant Goldsmith to strike out the testimony, all of the witness Victor Figone, as follows: Over the objection of defendant Goldsmith that no foundation therefor had been laid and that as to him the said matter was hearsay and was not connected with said defendant, the court permitted witness Victor Figone to testify:

"I purchased the whiskey from some gentleman in the Francisco Distributing. I understood that the man's name was Weiss."

The court denied the motion of defendant Goldsmith to strike out said testimony, said motion being made on the same grounds as the objection stated.

XVIII.

That the said District Court erred in overruling the objection to, and in denying the motion of counsel for the defendant Goldsmith to strike out the testimony of the [207] witness Milton Avila, on the ground it was hearsay, incompetent, irrelevant and immaterial. The full substance of which said testimony is as follows, to-wit:

"I have a tavern and restaurant, the Cerrito Club, in El Cerrito. The address is 448 San Pablo Avenue. I hold a liquor license at that place. During the months of December, 1943, or January, 1944, I purchased 75 cases of Old Mr. Boston Rocking Chair Whiskey. All my dealings were with Mr. Figone. I paid \$60 a case for the whiskey. That payment was by some odd \$1800 by check; the rest of it cash. I delivered that check [208] and cash to Mr. Figone. Subsequently I received the whiskey. A big dual truck came on January 3 and Vic helped me unload mine, and I helped him unload his. An invoice of that whiskey came by mail within the following week, some time, I don't remember exactly when, billed 'Francisco Distributing Company.' The check had been made payable to Francisco Distributing Company. I never went over to the Francisco Company."

to which ruling of the Court, counsel for the defendant Goldsmith duly Excepted.

XXIX.

That the said District Court erred during the examination in chief, of the witness James Cermusco, in admitting the following evidence and in making the following rulings, to-wit:

“Q. And what did you say to that?

Mr. Riordan: I object to this on the ground it is hearsay as to the defendant Blumenthal. It is completely hearsay as to him.

Mr. Duane: We also object on the ground it is hearsay as to the defendant Goldsmith, some unidentified person with whom this witness talked. Certainly such testimony is hearsay.

The Court: Is there any connection, counsel, between these checks and the account record of the Francisco Distributing Company?

Mr. Colvin: Oh, yes.

The Court: Do you propose to tie that in?

Mr. Colvin: I propose to tie that in and bring the actual account records of the Francisco Distributing [209] Company here, that is, their bank records which show the corresponding entries.

The Court: You wish this witness to testify as to a conversation with respect to these transactions in the whiskey?

Mr. Colvin: Yes, your Honor.

The Court: I will overrule the objection and you may have an exception, counsel.

Mr. Duane: Exception.

Mr. Friedman: I understand this is limited to the defendant Goldsmith.

The Court: To the defendant Francisco Distributing Company—to the defendant Goldsmith.

(The Witness, Continuing): Well, he says the San Francisco Warehouse. So we drove up the street, Third Street, and like I said, we stopped the car on Third Street between Mission and Market, and then from there we drove around and came back to Townsend Street, which the San Francisco Warehouse is right around the corner from Third Street, and then we went and seen that the whiskey was there, which it was, and from there on he said, 'Here is the bills for the whiskey,' and he wanted the money. So there we went back in the car, gave him the money, and he gave me the bill of ladings, I think they were, or bills of whiskey—I don't know what they were."

XXX.

That the said District Court erred in making the following ruling and in admitting the following testimony on the direct examination of the witness Walter J. Vogel, as the same appears of record:

"Q. Did you give any cash to this man, in addition to this check?"

Counsel for the defendant Goldsmith objected to the question upon the ground that no foundation had been laid. The Court overruled the said objection, to which ruling counsel for the defendant Goldsmith duly Excepted.

"The Witness: I did not give any cash at that time to this man when I gave him the check. After he brought me the bills, I gave him the cash. He

told me I would have to pay him for getting the whiskey. I think I gave him \$3,400 in cash."

XXXI.

That the said District Court erred in admitting in evidence over the objection of the defendant Goldsmith the following testimony of the Witness Francis Duffy:

"I gave this check (Government's Exhibit 48 for identification) to that man. The date of my first conversation with the man was about the third or fourth of December and took place at my place of business. I imagine the time of the conversation was in the early part of the afternoon, around 1:30."

Counsel for the defendants Feigenbaum, Blumenthal and Goldsmith, objected to the question upon the ground that the same was not binding upon any of said defendants and, the United States Attorney having stated that the testimony was offered particularly as to the defendant Goldsmith, but as to all of the defendants, the Court stated that the testimony would be admitted only as against the defendant Goldsmith, to which ruling counsel for the defendant Goldsmith duly Excepted. [211]

"(The Witness, Continuing): I have looked around and haven't been able to see this man in the court for two days now. He said to me, 'I understand you are interested in getting some liquor,' and I told him I was. And he told me, 'Well,' he says, 'I may be able to get you some.' So I said, 'Well, I would appreciate it very much, providing the

price didn't go too high.' So he said, 'I will be back and see you in a few days.' So he came back. At the time of this first conversation there was no mention made of the brand of whiskey at all. I told him I could take as high as 100 cases if I could get it. I did not give him any check on the first occasion. I did not have any other discussion with him on that first occasion. I had a conversation with him at a later time, after that first conversation on the 7th at my place of business. Nobody overheard the conversation at all. The first time the conversation took place around 1:30 in the afternoon. He came back again and said, 'Well, I think I have some liquor lined up.' I said, 'That's fine. How much is it going to cost me?' 'Well,' he said, 'it is \$24.50 a case is the price, but to make a certainty of getting the liquor, there will be a little premium.' I asked him how much the premium would be. So he said twenty dollars a case, so I said 'All right.' He said, 'Well, I will take a \$2,000 check now and when I come back again to give you the bill to get the whiskey out of the warehouse, you will have another check, \$450, and the additional \$2,000 in cash. He told me the additional money must be paid in cash. He did not say why it must be paid in cash. I had no further conversation with him at that time. The brand name hadn't been mentioned [212] yet. I understood it was to be fifths of whiskey. I knew it was going to be a blend of Bourbon whiskey. That is all. He said it was to be a blend of Bourbon whiskey. He said I would have it some time between the 17th and the first of the

year. He said he would be back to see me as soon as he had the bills to release the goods from the warehouse and everything straightened out. I had no more discussion with him whatsoever. I gave him the check for \$2,000 on the 7th. I did not see him write the name of the payee Francisco Distributing Company. He had not told me where the whiskey was coming from. The name of the payee was left blank. After the 7th of December I saw that man on the 17th in my place of business and had a conversation with him, at which nobody was present that overheard the conversation. He came and told me he had the warehouse release slip, and that he would pick up the check for \$450 and the additional money in cash. I had received no invoice as yet. That is all the conversation that I remember. Then I found out what kind of whiskey it was, and where it was billed through. He just told me it was Rocking Chair Whiskey, and I was to pick it up at the San Francisco Warehouse. He never made mention of the fact that the money was going through the Francisco Distributing Company. I have seen Francisco Distributing Company invoice No. 10081. It came into my possession in the mail a few days after I had picked up the merchandise on the 22nd of December, 1943. I went in a truck to the San Francisco Warehouse and picked up the whiskey there. The fellow and I who had the truck loaded it on the truck. The fellow with me was Vincent Markey. He ran our fruit and vegetable delivery service. I imagine the invoice came to me 3 or 4, maybe 5 days, after that [213] date. That was the first I saw the in-

voice. I have never seen this man since. On the 17th when I gave him this check for \$450 I gave him \$2,000 in cash. He didn't say anything about the ceiling price. I had no further transaction regarding this whiskey."

XXXII.

That the said District Court erred in admitting the following evidence and making the following rulings upon the direct examination of the witness Edward C. Harkins:

"I am special investigator for the Alcohol Tax Unit, working on the black market cases involving whiskey. My present office is Room 512 in the Custom House. I investigated this case with the assistance of others. I have had a conversation with Mr. Goldsmith regarding this case on several occasions. I was present early in January when Mr. Goldsmith and Mr. Weiss were together with special investigator Gaines. Mr. Gaines is a special investigator of the Alcohol Tax Unit. The conversation took place in the Empire Building, where we had our offices at that time. I believe there was an inspector by the name of Brunderol present. Inspector Wilson might have been present.

(To Mr. Friedman): The year is 1944.

Q. Was that conversation regarding this case?

Mr. Friedman: I object on behalf of the defendant Feigenbaum, as not binding upon him.

The Court: This testimony with reference to any conversation with the defendant Goldsmith, of

course it would not be admitted at the present time against the other defendants.

Mr. Dunne: As to the defendant Goldsmith, the [214] objection is that there has been no foundation laid, and no proof of any corpus delicti of the crime charged in the indictment.

The Court: I will overrule the objection. You may have an Exception.

(The Witness, Continuing): Special investigator Gaines was questioning both Mr. Weiss and Mr. Goldsmith regarding various shipments of whiskey. He asked them about these two carloads of Old Rocking Chair Whiskey, who purchased it, how it was handled. Mr. Weiss, I believe, did most of the talking. He said that his firm received \$2 a case for clearing it through their books. Mr. Goldsmith concurred in that. Mr. Goldsmith and Mr. Weiss both stated that they divided the \$2, each taking \$1.00. They both stated, agreed, that they did not sell any of the whiskey. It was sold by others, and they received the check generally for the payment of the whiskey in advance of the date that they had to take up the sight draft bills of lading. At that time they did not tell us who actually sold the whiskey. With relation to the disposition of these three carloads of whiskey, I think the conversation covered the import tax on this whiskey. After this conversation I had another conversation with Goldsmith regarding the facts of this case; early in September of 1944 in the State Building, San Francisco, was the next conversation.

Q. Who was present at the conversation?

Counsel for the defendant Goldsmith objected to the question upon the ground that the same was incompetent, irrelevant and immaterial and was after the conclusion of the alleged conspiracy in September, 1944, and also upon the ground that the corpus delicti had not been established. [215]

The Court overruled the objection, to which ruling counsel for the defendant Goldsmith then and there duly Excepted.

The Witness; Continuing: Special Investigator Koster of the State Board of Equalization and Mr. Goldsmith and myself were present. .

Mr. Colvin: Q. What was said relating to this case?

Mr. Dunne: The same objection, ruling and Exception, if your Honor please.

The Court: Very well.

(The Witness, Continuing): We questioned Mr. Goldsmith about who actually bought him the whiskey, who owned it, referring to these two carloads of Rocking Chair Whiskey. He said that Blumenthal brought it in; and when asked if he knew of his own knowledge, he said 'No.' We asked him what he received for his share of it, and he said the Francisco Distributing Company received \$2 per case, of which \$2 he gave Weiss half, gave Weiss \$1. There was a little other question, but it was quite a short interview at that time. I did not show Mr. Goldsmith any documents at that time. I think that is the essential part of the conversation as to Mr. Goldsmith. After that time we had a conversation with the defendant Goldsmith at the Of-

fice of the Alcohol Tax Unit on September 13, 1944. Mr. Goldsmith and his attorney, Mr. Duane, and, I believe, Mr. Roy Johnson, of the Alcohol Tax Unit, and myself, were present.

Mr. Dunne: Same objection.

Mr. Friedman: Same limitation, your Honor.

The Court: Same limitation, same exception noted by counsel for Mr. Goldsmith. [216]

(The Witness, Continuing): Mr. Goldsmith was further questioned about these two shipments of two earloads of Rocking Chair Whiskey, and at that time I showed him several invoices that I had in my possession. Government's for Identification No. 22, Francisco invoice to The Brig was in my possession then and there, and I showed that document to Mr. Goldsmith. I asked him who wrote this one, and he identified it as being in his handwriting and that he wrote it. Government's Exhibit No. 52, Francisco invoice to Fingerhut, was in my possession then and there, and I showed that document to Mr. Goldsmith. I asked him who wrote this, and he said that he wrote it. Except, he said, he did not make the notations of the \$2,000. He said he didn't know who made that. I referred to the notation, "Received on account \$2,000. Balance due \$450."

The document now shown me, Government's No. 58 for identification, Francisco invoice to Travis, I showed that document to Mr. Goldsmith. He identified that document as being in his handwriting, all but the notation likewise on this. He said he didn't know who wrote that. I showed Mr. Gold-

smith various other documents. He identified a number of invoices that he wrote. He stated that he wrote most of the invoices, that a few were written by his bookkeeper. On that occasion, I had other conversations with him relating to these two carloads. We again asked him about the deal and we got the same answer that they received \$2 per case, and he stated at that time, I believe, that up to July 1, 1943, Mr. Weiss had been his partner, or on two occasions, I believe, he made the same statement, and that subsequent to July 1, Mr. Weiss was the sales manager but that he felt he was entitled to half the profits, and he [217] divided the profits with him, including the \$2 per case received on this Rocking Chair Whiskey. I did not have any later conversation than the one in which these documents were identified with Mr. Goldsmith."

XXXIII.

That the said District Court erred in granting the motion of the United States Attorney at the conclusion of the trial that all testimony and all exhibits be admitted as against all the defendants and in overruling the specific objections and denying the several motions of counsel to strike the testimony of certain witnesses from the record, all of which from the record and proceedings herein, fully and at large appears, to which said order granting said motion of the said United States Attorney, and to which said order overruling the objections of counsel to the admission of said testimony, and denying the motions to strike out the said evidence

and the said testimony admitted, as aforesaid, upon said motion of the United States Attorney, counsel for the defendant Goldsmith then and there duly Excepted.

XXXIV.

That the said District Court erred in giving the following instruction to the jury:

"In every crime, there must exist a union or joint operation of act and intent, and for conviction, both elements must be proved to a moral certainty and beyond a reasonable doubt. Such intent is merely the purpose or willingness to commit such an act; it does not require any knowledge that such act is a violation of the law. However, a person is presumed [218] to intend to do all that he voluntarily and willfully does, in fact, do, and must be presumed to intend all the natural, probable and usual consequences of all his own acts."

to which instruction counsel for the defendant Goldsmith duly Excepted.

XXXV.

That the said District Court erred in giving the following instruction to the jury, to which counsel for the defendant Goldsmith duly Excepted:

"In the course of a trial, as in this case, which has run a number of days and several hundred pages of transcript as I understand, you may find some discrepancies, or inconsistencies in the transcript of a witness, or perhaps between the testimony of different witnesses. If such discrepancies or inconsistencies are not material, and they do not

affect the true issues of this case, and if they do not reasonably bear upon the guilt or innocence of the defendants, or any of them, do not waste your time in considering them."

XXXVI. \

That the said District Court erred in giving the following instruction to the jury, to which counsel for the defendant Goldsmith duly Excepted:

"To constitute a conspiracy, it is not necessary that two or more persons should enter into an express agreement for the unlawful venture or scheme, or that they should directly state between themselves, or otherwise, [219] what the unlawful plan or scheme is to be or the details thereof, or the means by which the unlawful combination is to be made effective. It is sufficient that two or more persons, in any manner, positively or tacitly come to a mutual understanding to accomplish an unlawful design. In other words, when an unlawful end is sought to be effected, and two or more persons, actuated by the common purpose of accomplishing that end, work together in any way in furtherance of the unlawful scheme, everyone of such persons becomes a member of the conspiracy."

XXXVII.

That the said District Court erred in giving the following instruction to the jury to which counsel for the defendant Goldsmith duly Excepted:

"Each party must be actuated by an intent to promote the common design. If persons pursue by their acts, the same unlawful object, one performing

one act and a second another act, all with a view to the attainment of the object they are pursuing, the conclusion is warranted that they are engaged in a conspiracy to effect that object. Cooperation in some form must be shown. There must be an intentional participation in the transaction with a view and purpose to further the common design, and if a person, understanding the unlawful character of a transaction, encourages, advises or, in any manner, with a purpose to forward the enterprise or scheme, assists in its prosecution, he becomes a conspirator. And so, a new party coming into a conspiracy after its inception, with a knowledge of its purposes and objects, and with an intent to promote the same [220] becomes a party to all of the acts done before his introduction into the unlawful combination, as well as to the acts done afterwards. Joint assent and joint participation in the conspiracy may be found, like any other fact, as an inference from facts proved."

XXXVIII.

That the said District Court erred in giving to the jury the following instruction, to which counsel for the defendant Goldsmith duly Excepted:

"In this case, as I have already told you, there are five defendants. Having in mind all the instructions and rules of law that I have given to you, you may find all the defendants guilty, or all the defendants either guilty or not guilty, in accordance with the rules and statements as to the law that I have given you."

XXXIX.

That the said District Court erred in giving to the jury the following instruction, to which counsel for defendant Goldsmith duly excepted:

“It is not necessary that it be shown that any person concerned in the alleged conspiracy profited by the things he did, but if any of the defendants, with knowledge that the law was designed to be violated in the particular manner charged in the indictment, aided in any way by affirmative act in the accomplishment of the unlawful act, they would be guilty. To this statement there is but one exception, and that is, if before any overt act has been committed on the part of any conspirator or at his suggestion or with his aid or participation, any such conspirator withdraws from [221] the conspiracy and wholly disassociates himself from the project, or the carrying out thereof, he ceases to be a conspirator and is without guilt.”

XL.

The court erred in denying the motion of the defendant Goldsmith, made at the conclusion of all of the evidence in the case, to strike out all testimony of all acts and declarations of any person not made in the presence or with the knowledge or with the consent of defendant Goldsmith, upon the ground that it was incompetent, irrelevant and immaterial, was as to said defendant hearsay, and was without foundation in that there was no other or independent proof of the connection of said defendant with any alleged conspiracy, being a motion made by

said defendant in connection with his objection to the admission in evidence against him of all evidence offered and received as against other defendants and being made upon the same grounds as said defendant's objection to the Government's said motion, all as more particularly appears by Assignment VIII, to which reference is hereby made.

Wherefore, the said defendant Lawrence B. Goldsmith prays that the aforesaid judgment of said District Court be reversed, and that this defendant go hence sine die.

Dated: July 23rd, 1945.

(Signed) ARTHUR B. DUNNE,

(Signed) WALTER H. DUANE,

Attorneys for Defendant and Appellant, Lawrence B. Goldsmith.

(Acknowledgment of Service.)

[Endorsed]: Filed July 23, 1945. [222]

[Title of Court and Cause.]

DEFENDANTS' BILL OF EXCEPTIONS

Be It Remembered:

That this cause came on regularly for trial the 15th day of May, 1945, in the Southern Division of the United States District Court in and for the Northern District of California, before Honorable Louis E. Goodman, United States District Judge, Frank J. Hennessy, Esq., United States Attorney, by Reynold H. Colvin, Esq., and James T. Davis,

Esq., Assistant United States Attorneys, appearing as counsel for the United States of America, Morris Oppenheim, Esq., and Thomas J. Riordan, Esq., appearing as counsel for the defendant Harry Blumenthal, Harry K. Wolff and Sol Abrams, appearing as counsel for the defendant Louis Abel, Arthur B. Dunne, Esq., and Walter H. Duane, Esq., appearing as counsel for the defendant Lawrence B. Goldsmith, Leo R. Friedman, Esq., appearing as counsel for the defendant Albert Feigenbaum, and the defendant Samuel S. Weiss appearing in his own proper person.

Thereupon a jury was duly impaneled and sworn to try the cause, and was duly charged with the deliverance of said defendants, whereupon the following proceedings, and none other, were taken and had: Reynold H. Colvin, Esq., Assistant United States Attorney, made the following [225] opening statement on behalf of the Government:

“The conspiracy charged here is conspiracy to sell certain cases of Old Mr. Boston Rocking Chair Whiskey at a price above the ceiling price. The evidence of the Government will indicate that there were two carloads of Old Mr. Boston Rocking Chair Whiskey brought in from the East. All in all, there were 4040 cases in these two carloads. Now, in presenting this matter to you the Government will trace the purchase and shipment of these carloads from the East through the records of the Alcohol Tax Unit, through the freight company, through the warehouse company, and through the bank which collected for the sight drafts in this case.

"So far as the records of the bank are concerned, they will show that the money was paid from the account of the Francisco Distributing Company. And that brings us to the question of the defendants, the particular defendants, and who they are. The defendant who was the licensee, who held the wholesale liquor license for the Francisco Distributing Company was Mr. Goldsmith. He held that license all during the months of December, 1943 and January, 1944, when the sales of this whisky from wholesaler to retailer took place. And Mr. Weiss was an employee of Mr. Goldsmith and the Francisco Distributing Company during this period. He acted as salesman for that company and as an employee, and a close associate of Mr. Goldsmith. The evidence will show that the profit to Goldsmith and Weiss for bringing in this whisky was \$2, which was split evenly among them as to each case—in other words, \$4040 for Goldsmith and \$4040 for Weiss.

"The bank records will indicate that the purchase price [226] of this whisky was in excess of \$78,000, or a little less than \$20 per case.

"Now we move on to the other aspect of the case, the question of the sale of the whisky. First we might note that Mr. Nathanson, of the Office of Price Administration, will testify as to the ceiling price of this whisky, \$25.24 per case. Now, there is in this case a series of invoices which will be presented to you as jurors. Some of these invoices were made out by Mr. Goldsmith. Some of them by an employee of the Francisco Distributing Company other than Mr. Goldsmith. Each of those invoices sets the price

on the whiskey at \$24.50 per case, some 75 cents lower than the actual maximum ceiling price.

"The evidence will show that those invoices were a mere facade, a front for these transactions, because in each of the transactions where there is an invoice for \$24.50, the Government will prove that in addition to the amount shown by the invoice there was a cash payment, not of record, of anywhere from \$25 to \$35 per case, and in one or two instances \$40 per case. So far as the price violation, then, the evidence of the Government will be that while the whisky was billed at \$24.50 per case, it was sold at prices between \$55 per case and \$65 per case.

"Now, what was the participation of these other defendants in the case? First there is Mr. Blumenthal. During these activities Mr. Blumenthal operated a sporting goods store on Third Street between Mission and Market. He actually made sales of this whisky above the ceiling price. He was referred to, as the evidence will show, by one of the other defendants as the 'Big Shot.' The money passed through his hands. He received checks made out to the [227] Francisco Distributing Company. And while we are speaking of checks, it might be noted that we have exactly the same situation, as the evidence will indicate, as to the checks that were added to the invoice. In each case that we will bring forward here the check will be for an amount which is a multiple of \$24.50. In those instances, which we will show you where there was a sale of 100 cases of whisky, the check is made out to the Francisco Distributing Company in the amount of \$2450, which

would be within the ceiling price. But the evidence will show that the check is the same type of purported transaction as the invoice. It matches the invoice. But that in addition to the check there was in each instance which we shall bring forward a cash payment.

"Now, Mr. Feigenbaum, another of the defendants, as you probably heard here, operates a drug store, did operate a drug store, but in the Mission. He held at those premises a retail liquor license and was engaged in that business there apparently in connection with the drug business. But he did make a sale of some 100 cases of whisky where the ceiling price was violated, and the evidence will indicate that in that instance the sales price was approximately \$65 per case.

"Mr. Abel, the fifth of the defendants whom I have mentioned, operated a loan office in the City of Vallejo. All of the sales that we know of made by Mr. Abel were sold to people living in Vallejo, to people who operated taverns there. In each of those cases again there was the purported legitimate transaction, the invoice which these tavern owners received from the San Francisco Distributing Company for \$24.50 per case, and the check made out to the Francisco Distributing Company for \$24.50 per case. But [228] the evidence will show, when these tavern owners come and testify before you, that in each of those cases there was a silent factor added to the \$24.50 purportedly legitimate transaction; in each of those cases there was a cash overpayment on the ceiling price.

"I think that that outlines for you the case as the Government will present it."

Thereupon counsel for each and all of the defendants reserved their opening statements.

ALMON C. JONES,

called as a witness by the Government, and having been first duly sworn to testify to the truth, the whole truth and nothing but the truth, testified as follows:

Direct Examination

By Mr. Colvin:

I am in the United States Internal Revenue Service, Alcohol Tax Unit. My designation is that of chief bonded accounts division. My division supervises the issuance of basic permits and the receiving of reports from the various proprietors of liquor production plants, bonded wineries, breweries, wholesale dealers, and so forth, for what is known as the 14th District, consisting of California, Arizona, Nevada and Hawaii. I appeared here in court pursuant to a subpoena from the Clerk of the District Court, and I was instructed to bring with me certain documents and among those documents was the license of the Francisco Distributing Company. Pursuant to that subpoena, I brought this file [229] which you now show me. I have in this file Wholesale Liquor Dealers' Basic Permit issued to the Francisco Distributing Company, operated by L. B. Goldsmith, which was in effect during No-

(Testimony of Almon C. Jones.)

vember and December of 1943, up to and including January of 1944. It, however, is not a license. It is a basic permit. The license of the Francisco Distributing Company is in the name of Lawrence B. Goldsmith.

Thereupon the said Wholesaler's Basic Permit was offered in evidence by the Government, and was received in evidence and marked U. S. Exhibit 1, and was read to the jury. The said document is in the words and figures following, to-wit:

"Form 1633

Treasury Department

Internal Revenue Service

July 1940

Amended Permit No. 14-P-91 (To show withdrawal of SS Weiss from the partnership)

WHOLESALE'S BASIC PERMIT

(Under the Federal Alcohol Administration Act
and Regulations)

L. B. Goldsmith, dba Francisco Distributing Co.
122 Tenth Street,
San Francisco, California.

Pursuant to application dated June 9, 1943, you are hereby authorized and permitted to engage, at the above address and at branch offices and other places of business, in the business of purchasing for resale at wholesale distilled spirits and wine, and, while so engaged, to sell, offer and deliver for

(Testimony of Almon C. Jones.)

sale, contract to sell and ship, in interstate and foreign commerce, the alcoholic beverages so purchased.

This permit is conditioned upon compliance by you with sections 5 and 6 of the Federal Alcohol Administration Act, and all other provisions thereof; the Twenty-first [230] Amendment and laws relating to the enforcement thereof; all laws of the United States relating to distilled spirits, wine, and malt beverages, including taxes with respect thereto; all applicable regulations made pursuant to law which are now, or may hereafter be, in force; and the laws of all States in which you engage in business.

This basic permit is effective from the date hereof and will remain in force until suspended, revoked, annulled, voluntarily surrendered, or automatically terminated, as provided by law and regulations.

This permit is not transferable.

J. H. MALONEY

District Supervisor,

By Q. J. BOONE

Acting District Supervisor.

U. S. Government Printing Office 10-18480

(The permittee agree, by accepting this amended permit, that issuance thereof shall not relieve him of any liability heretofore incurred.)

(Testimony of Almon C. Jones.)

The Witness: (Continuing)

I was instructed by the terms of that subpoena to bring with me the wholesale basic permits in effect during November and December 1943 and January of 1944, of Samuel S. Weiss, Louis Abel, Albert Feigenbaum and Harry Blumenthal. I have not brought any such basic permits with me because an examination of the files of the alcohol tax units indicates no such permits existed. My department has on file under my direction and supervision certain forms known as the 52-A forms. Fifty-two-A form used by the alcohol tax unit is the form on which the wholesale liquor dealers report the detailed receipt of merchandise. 52-B form is a counterpart of 52-A on which the dealer reports the disposition of merchandise. [231]

"U. S. Exhibit 2" for identification, a document entitled "Wholesale Liquor Dealer's Monthly Report, summary of forms 52-A and 52-B," is one of the documents I brought with me pursuant to the subpoena served upon me. The document shows the purchases of the Francisco Distributing Company during the month of December of 1943, as kept in my records.

Thereupon counsel for the Government offered the said document in evidence.

Counsel for defendant Blumenthal objected to the introduction of the said document in evidence upon the ground that no proper foundation had been laid and that the same was incompetent, irrelevant and immaterial. Counsel for the defendant

(Testimony of Almon C. Jones.)

Goldsmith objected on the ground that the same was incompetent, irrelevant and immaterial, and had nothing to do with the issues in the case, and that any purchases of any commodity made by the defendant Goldsmith or the Francisco Distributing Company were not in issue. Counsel for the defendant Blumenthal further objected upon the ground that the said exhibit was hearsay and irrelevant as to the defendant Blumenthal, and that, unless the said defendant was implemented into the conspiracy, the Government had no right to introduce the said evidence against the said defendant Blumenthal. Counsel for the defendant Feigenbaum objected to the introduction of the said document in evidence as to the defendant Feigenbaum, upon the ground that the same was incompetent, irrelevant and immaterial, in that it purported to be certain transactions between the defendant Goldsmith and the alcohol tax unit, to which defendant Feigenbaum was not a party and of which he had no notice, and that the said transactions were done out of his presence and without his knowledge and were not binding upon him; and upon the further ground that the same was hearsay as to [232] the defendant Feigenbaum and did not establish that the liquor was bought or sold or acquired as against anybody except the person who made the declaration, and if the question of the acquisition and sale of the said liquor was involved, so far as the defendant Feigenbaum was concerned, the said document was not the best evidence and was hearsay and not binding upon

(Testimony of Almon C. Jones.)

the said defendant. Counsel for the defendant Goldsmith made the further objection that the charge in the indictment concerned a conspiracy in this district, and the sale of certain liquor in this district, and that any records with reference to the purchase of liquor by the distributing company had nothing to do with the matter, and that the court was concerned with the conspiracy, not where the liquor came from, who gave it, or who bought it, and that the liquor was in this jurisdiction, and was sold in this jurisdiction.

The court overruled each and every one of the said objections, to which counsel for each of the said defendants then and there duly excepted.

Thereupon counsel for the defendant Abel suggested that all objections made and exceptions noted should run in favor of all of the defendants, with the right to move to strike thereafter; and the court then and there ordered that the record so show.

Thereupon the document last referred to; to-wit, "U. S. Exhibit 2 for Identification", was received in evidence as U. S. Exhibit 2.

The Witness: (Continuing)

I am familiar with the document marked Government's Exhibit No. 3 for Identification, entitled "Wholesale [233] Liquor Dealer's Monthly Report, Summary of Forms 52-A and 52-B," bearing the date "Month of January 1944." That document was brought with me pursuant to the subpoena served upon me, and is kept under my direction and supervision as one of the duties of my

(Testimony of Almon C. Jones.)

employment with the bonded account section of the alcohol tax unit.

Thereupon U. S. Exhibit 3 was received in evidence, subject to the objections of all of the defendants made to Exhibit 2, and subject to the exceptions of all of said defendants.

The Witness: (Continuing) I have under my supervision and direction the 52-A and 52-B records of the Francisco Distributing Company which had been filed through the months March 1942 to the month of December 1943. I have access to these forms.

Thereupon U. S. Exhibits 4, 5 and 6 were admitted in evidence for the limited purpose of showing that there were no sales of the particular whiskey mentioned in the indictment covered by the said reports, to the introduction of which counsel for the defendants objected upon the ground that the same were incompetent, irrelevant and immaterial and no part of the *res gestae*, and that there was no foundation laid for the introduction thereof, and that, so far as the defendant Feigenbaum was concerned, there was no proof to show he made the returns. All of said objections of counsel for each of the said defendants were overruled by the court, to which ruling counsel for each of said defendants duly excepted, and said exceptions were noted by the court.

Cross-Examination

By Mr. Weiss:

It is not required that salesmen hold a basic per-

(Testimony of Almon C. Jones.)

mit. It would be permissible for you to sell liquor for somebody else, for some permittee, without a basic permit. [234]

ROBERT OTIS GRUBBS

called as a witness on behalf of the Government, and having been first duly sworn, testified as follows:

Direct Examination

By Mr. Colvin:

I am known as Chief Claims Clerk, Santa Fe Railroad, San Francisco. I have seniority back to 1911, but I have worked for them several times before that. It dates back as far as 1902. I have held this particular position since 1919. I appear here under subpoena from the Clerk of the District Court. That subpoena directed me to bring with me certain freight bills. I have them with me.

Thereupon, a freight bill produced by the witness was marked U. S. Exhibit 7 for identification. Another bill of lading was marked U. S. Exhibit 8 for identification. The witness testified: Those two freight bills are kept as a permanent office file pursuant to the conduct of the Santa Fe's business. The documents now shown me are copies of the original records No. 7 and No. 8. Thereupon, U. S. Exhibits 7 and 8 for identification were received in evidence.

Cross-Examination

By Mr. Friedman:

I did not see the cars this whiskey was in.

Thereupon, counsel for the defendant Blumenthal moved to strike out all the evidence of the witness as being incompetent, irrelevant and immaterial and not binding on the defendant Blumenthal. The court denied the motion, to which ruling of the court, counsel for the defendant Blumenthal duly excepted.

FRED H. SANDER,

called as a witness by the Government, and having been first duly sworn, testified as follows: [235]

I am Division Manager of the Liquor Department, San Francisco Warehouse Company, and have been so employed fifteen years. I supervise the handling and distribution of distilled spirits. I am here pursuant to a subpoena by which I was instructed to bring with me certain documents. I was

uired to bring with me certain records of the receipt and unloading of two railroad cars. I have those records with me. I have with me the records of the receipt of the two railroad cars. The first is a receipt of a car PRR 568500; the second is a car B & O 174149. The records of receipts are on separate sheets of paper. This is the record of receipts here. There has been a division of this stuff; part of it went ex car and the balance went into the warehouse for further distribution at a later date. These documents stapled together represent the receipts of 650 cases in the warehouse, and this was distributed at a later date ex this car PRR 568500. This here is the evidence of deliveries ex that same car of 1426 cases. That is the record of

(Testimony of Fred A. Sander.)

deliveries that I spoke of. This document is the record of receipts of 650 cases. The rest of it was delivered and that remained. I have brought with me a record of receipts of the second car. I don't have a record of the receipts of the balance of that portion which was delivered. That portion was delivered from the car under orders from the Francisco Distributing Company. It didn't go into the warehouse. 1426 cases were delivered ex car. By "ex car" I mean delivered right from the car on arrival. 1426 cases were delivered right from the car on arrival. Thereupon counsel for the defendant Goldsmith moved that the last statement of the witness be stricken out on the ground that it was incompetent, irrelevant and immaterial hearsay, and that there was no foundation laid for it. The court denied the motion; to which counsel for all the defendants duly excepted. [236]

Mr. Colvin: Q. Mr. Sander, who, is anyone, instructed you regarding the unloading of the two freight cars whose numbers appear in your records?

Counsel for the defendant Goldsmith objected to the question upon the ground that it was incompetent, irrelevant and immaterial and assumed something not in evidence. The court overruled the objection, to which ruling counsel for all the defendants duly excepted.

The Witness: (Continuing) The instructions came through a Mr. Weiss, representing himself as the Francisco Distributing Company. Mr. Weiss

(Testimony of Fred A. Sander.)

personally gave me those instructions. I see Mr. Weiss here in the court room; the gentleman with the bluish grey suit and light brown—the second man from the front or far side of the counsel table. I held a conversation with Mr. Weiss covering the unloading of these cars. (To Mr. Friedman): The conversation took place, to the best of my knowledge, at our office. The date of the conversation was on or about December 15, 1943. Nobody was present beside Mr. Weiss and myself.

Q. What was the content of this conversation relating to those shipments?

Counsel for the defendant Blumenthal objected to the question on the ground that it was incompetent, irrelevant and immaterial hearsay, no part of the res gestae so far as the defendant Blumenthal was concerned, and not within the issues of the charge of conspiracy as far as the defendant Blumenthal was concerned, and asked the court that if the conversation was related, that the jury be instructed to disregard the statement as to the witness Blumenthal. The court stated that it would not instruct the jury to disregard the statement to which ruling of the court counsel for the defendant Blumenthal duly excepted. [237]

Counsel for the defendant Abel objected to the question upon the ground that the same was hearsay and a like objection was made by counsel for the defendant Feigenbaum. The court overruled the said objections, to which ruling of the court counsel for the said defendants severally excepted.

(Testimony of Fred A. Sander.)

The Witness: (Continuing) Mr. Weiss came in to ask us if we could handle the cars or distribution for him, and after a little consultation about it in our distribution office, we finally agreed to accept the car for him and distribute it and asked him to give us his address. He said he would arrange to have them down to us. I subsequently received certain orders from Mr. Weiss. These are all dated December 17, 1943, so I presume it was on that day. I have here certain orders. They are all together here in the file. This is the merchandise which was delivered ex car 1426 cases. When I refer to "this car", I mean that car for which receipt was dated December 17, 1943. The number of that car was PRR 568500. These documents, the records of receipts and the others received by me from Mr. Weiss have been in our files as part of our records since that time. Thereupon, counsel for the Government offered the said documents in evidence.

The Court: Before we proceed with the testimony of this witness, I think it in order that each defendant here, in some cases having more than one attorney, and a number of attorneys involved, it will probably save time for all concerned if we make a different ruling in connection with the admission of testimony. It is probably fairer for the Government to assume the burden in that regard, and therefore the Court will change the ruling heretofore made in connection with the testimony of the witness Jones, and the testimony of the wit-

(Testimony of Fred A. Sander.)

ness Jones, together with the exhibits offered in connection with his testimony, will be admitted in evidence only as [238] against Goldsmith, and then whenever the Government deems it appropriate, it may move to admit that testimony as to all the defendants. I suggest that Mr. Davis keep a record of the different witnesses in that regard and whenever the Government feels that evidence, if that time does arrive, may be admitted as to all the defendants, it may make an appropriate motion to that effect. As the testimony is presented, the court will admit it as to the defendants against whom it appears to be pertinent at the time. It will be up to the Government at the time to admit it as to all the defendants, or so many of them as the Government feels it applies to. Now, as to the witness Grubbs, the testimony so far presented may apply to the defendant Goldsmith. Of course, the conversation of the defendant Weiss may be admitted as against both the defendants Goldsmith and Weiss.

To this ruling of the court, counsel for the defendant Goldsmith duly excepted.

The court stated that so far as the testimony of the witness on the stand pertained to the conversation with the defendant Weiss, it was admitted only as to the defendant Weiss.

The Witness: (Continuing) I can identify this document entitled "San Francisco Warehouse Company, 625 Third Street", dated San Francisco, December 17, 1943, "For Account of Francisco Distributing Company Warehouse #6, PRR

(Testimony of Fred A. Sander.)

568500" as being my record of the receipt of 650 cases of Old Boston Rocking Chair Whiskey at the date stated.

Thereupon, counsel for the Government offered the document in evidence as Government's Exhibit next in order. [239]

Counsel for the defendant Goldsmith objected to the introduction of the said document upon the ground that it was self-serving, that no proper foundation had been laid for it, and that it was not binding upon any of the defendants.

The Witness (Continuing): I had no dealings whatsoever with the witness Goldsmith. I had dealings with Mr. Weiss and those dealings regarded Pennsylvania Railroad car PRR 568500. That car was received by my warehouse company. This document shown to me represents the record of the receipt of 650 cases from that car. Thereupon, counsel for the Government offered the said document in evidence. Counsel for the defendant Goldsmith objected upon the ground that it was incompetent, irrelevant and immaterial. The court overruled the objection, to which ruling counsel for the defendant Goldsmith duly excepted. The document was marked U. S. Exhibit 9 in evidence. The court stated that the document was admitted in evidence against the defendant Weiss.

The Witness: (Continuing) I can identify this sheaf of invoices now shown to me. These are car instructions which is headed "Francisco Distributing Company" to deliver various lots of cased

(Testimony of Fred A. Sander.)

distilled spirits called Old Mr. Boston Rocking Chair to the respective people, customers of theirs, I presume, in the amount of 1426 cases.

Counsel for the defendant Goldsmith objected to this testimony upon the ground that it was incompetent, irrelevant and immaterial and called for the opinion and conclusion of the witness and was hearsay as to the defendant Goldsmith.

The Witness: (Continuing).

The Court: Where did you get these papers?

The Witness: These papers were handed to me by Mr. Weiss at our office, 625 Third Street, San Francisco. [240] We did not have the cars in our possession. We had advised Mr. Weiss to arrange to pay the freight, surrender the bills of lading to the Railroad so we could get the cars into the warehouse. We subsequently got possession of the merchandise in these cars and made delivery of it in accordance with these documents. Thereupon, the Court admitted the document in evidence, to which ruling of the Court counsel for the defendants Goldsmith and Blumenthal duly excepted. The document was marked U. S. Exhibit 10 in evidence.

The Witness (Continuing): The sheaf of invoices entitled "Francisco Distributing Company, 122 Tenth Street," came into my personal possession on or about December 17, 1943. These were received from Mr. Weiss by me at our office and have since been in my records and files. The documents were marked U. S. Exhibit 11 in evidence.

The Witness: (Continuing) There is (sic) in

(Testimony of Fred A. Sander.)

my hands here, five in number, which we call delivery orders, comprising a form of invoice which reads "San Francisco Distributing Company", with an order number—the invoice order number—and it discloses thereon "Francis E. Duffy", as an example.

After discussion with counsel, the Court stated that the document would be admitted in evidence as against the defendant Weiss, and that the ruling would also apply to Exhibit 10.

The Witness: (Continuing) My warehouse company received Car B & O 170144. I have a record of the receipt of that car. The document shown me is that record. That car was received pursuant to an arrangement with Mr. Weiss. I had a conversation with Mr. Weiss regarding the receipt of that car. That conversation took place at our office on or about December 31, 1943. Beside Mr. Weiss and myself, the usual [241] office staff were present. I dealt with Mr. Weiss at the time myself.

Q. What was the content of that conversation with reference to the car which we have mentioned by number? Counsel for the defendant Blumenthal objected to the question and the Court stated that the evidence was admitted as against the defendant Weiss.

(The Witness, Continuing): He came in and asked us if we could handle another car of whiskey for him, and I questioned it at the time, and later on I finally decided to take it on for him, and he finally came in with these documents as to the dis-

(Testimony of Fred A. Sander.)

tribution. This first document represents the record of the carload by me and has been kept as part of my record. A total of 1964 cases were received as part of that shipment. It consisted of cases of fifths, Old Rocking Chair Whiskey. The document was admitted against defendant Weiss and marked U. S. Exhibit 12 in evidence.

The Witness: I have here a sheet of invoices which came into my possession on or about January 3, 1943. I received these invoices from Mr. Weiss. He presented these invoices to me with instructions to get the merchandise shipped as soon as possible on arrival of the car. That conversation took place at our office. At that time, the carload had not arrived. I think there is a letter in there. We addressed a letter to the Santa Fe Railroad Company December 31, 1943. That means we received the car on or about January 3, 1944.

(To the Court): This represents the Francisco Distributing Company's order to deliver a record of the serial numbers that were filled on each order, a copy of the carrier bill of lading on which the merchandise moved to the customer's place of business. I delivered all this merchandise in accordance with these documents that I have here. These were all [242] records kept by my office, and they all relate to the cases of whiskey in the B & O car 174149.

The Court admitted the documents in evidence as against the defendant Weiss, and they were marked U. S. Exhibit 13.

(Testimony of Fred A. Sander.)

(The Witness, Continuing): This is a part of that same deal wherein it is delivered from the car—this is stock delivered from the same car out of our warehouse. These invoices regard B & O car 174149, and they are part of the same transaction and the record kept by my firm, and they supplement the Government's Exhibit 13 which I just identified. They are part of the same transaction, the same car. That is our method of handling records. On one set of records we kept actual deliveries from rail cars and the other set of records are kept from actual deliveries taken from rail cars, and then future deliveries made from that stock. That last group of papers refers to an additional group of shipments than those contained in the last exhibit.

Mr. Weiss: Your Honor, at this time, I would like to say I never gave him those. I am willing to have bills that I gave him admitted, but those I do not know anything about I would rather object to their admission.

The Court: Well, in the form you make the objection, I will overrule it. I do not know what you are getting at. You may have an exception to the Court's ruling.

The Witness: This is—we will take this as an example—an order for the entire operation for the distribution of that car. It reads "Deliver to Dillon's," with a certain address, and an order number which reads—these are delivery orders, our instruction to deliver merchandise. This here attached is a report of the serial numbers of each case that went

(Testimony of Fred A. Sander.)

out on this order. The first pink document on [243] top is the delivery order given to me by Mr. Weiss. Before deliveries of case whiskey can be made, we are required to take the number off—a record of the number off each case and report it to the actual owner of the merchandise. The first is an order for my company to do certain things with the merchandise. The second sheet attached to the order is a list of the numbers of the particular merchandise I allocated to that order. This is a copy of the bill of lading on which the shipment was made. Our shipment to the customer that is represented on this order, that is a regular commercial document made up by all transportation people. It is the document of my own company. The next paper, as I stated before, is another order, the procedure of which is like the first one, I just—the rest of them are just duplicates of the first, referring to different points of delivery and different cases of whiskey. We make up bills of lading on all cases of distilled spirits moving out of our warehouse, whether city deliveries or shipments. Thereupon, counsel for the Government offered the document in evidence, to which counsel for the defendant Goldsmith objected upon the ground that it was incompetent, irrelevant and immaterial, self-serving and not binding upon the defendant Goldsmith. The Court admitted the document in evidence as to the defendant Weiss. The defendant Weiss objected to the same, and the Court overruled the objection, to which the said defendant

(Testimony of Fred A. Sander.)

Weiss duly excepted. The documents were marked U. S. Exhibit 14 in evidence.

The Witness: I sent a bill for the services which my company rendered in this matter.

Q. To whom did you send the bill?

Counsel for the defendant Feigenbaum objected to the question upon the ground that the same was self-serving. [244] The Court overruled the objection to which counsel for the defendant Feigenbaum duly excepted.

The Witness: We sent an invoice to the Francisco Distributing Company.

Mr. Colvin: Q. At whose direction did you send your invoice to the Francisco Distributing Company?

A. Mr. Weiss. Counsel for the defendant Goldsmith objected to the question on the ground that it was incompetent, irrelevant and immaterial, not binding upon the defendant Goldsmith and hearsay. The Court admitted the testimony as to the defendant Weiss.

Examination by Mr. Weiss: I don't recall right at the moment that you also handed some documents to one of my associates in the office when I was not present. It might be possible that you handed some other documents to my associate, Mr. Higgins. I distinctly remember that you handed the documents on the first car over to me. As to the second car, I believe the same thing occurred but I finally, eventually gave them over to Mr. Higgins at a later time during the day or the following day, to get the bills

(Testimony of Fred A. Sander.)

of lading and arrange for the car. I can't remember at this time whether I asked you to turn those documents over to Mr. Higgins. I will say this, that you have given me the greater amount of all those documents. There might have been some that you gave to Mr. Higgins. I can't say that far back because we handled so much stuff. My statement is that I am not definite with respect to that.

Redirect Examination

By Mr. Colvin:

As to the first document, I am positive that those documents came from Mr. Weiss. As to the second carload, I recall Mr. Weiss talking to me, and later these documents came into my possession [245]

Recross Examination

By Mr. Friedman:

The first car was the Pennsylvania Railroad car and the Baltimore & Ohio was the second car. The first car was PRR 568500, the second car being B & O 174149. Thereupon, counsel for the Government stated to the jury the substance of the documents in evidence as follows: Government's Exhibit No. 2 is a Wholesale Liquor Dealers' Form 52-A and 52-B for the month of December, 1943. As part of this exhibit, on page 1 thereof is a record of the purchase of 2076 cases of whiskey through the Penn Midland Import Company of New Jersey from the Ben Burke, Inc. Government's Exhibit No. 3

(Testimony of Joseph N. Nathanson.)

tion there. I can't see that that would do any harm.

Mr. Friedman: I would ask your Honor to limit this testimony so that it does not go in as against the defendant Feigenbaum, who is not within either of the categories mentioned by Mr. Colvin.

Mr. Riordan: Before the Court rules on that may I for the record, for the defendant Blumenthal, adopt the objections made by Mr. Friedman and Mr. Duane, and object upon the further ground that it is an unlawful delegation of power in any event, also reiterating Mr. Friedman's objection particularly as to Mr. Blumenthal, that this is in no way binding upon the defendant Blumenthal as far as this evidence goes, because of the fact [252] that there is no tie-in regarding any records here, everything that has been introduced at this time concerning it. I realize your Honor has that in mind.

The Court: I will instruct the jury that the instructions as to this order of the Price Administrator are now only being considered by the jury as against the defendant Goldsmith and if it is connected up with the other defendants it may be admitted later as to them.

Mr. Duane: May I, then, in behalf of the defendant Goldsmith, your Honor, make this further objection: that the order referred to and promulgated by the Office of Price Administration, and the Price Administrator, is invalid and void, and that such order was adopted by the use of a dele-

(Testimony of Joseph N. Nathanson.)

gation of power which of itself was invalid in this case.

The Court: That objection will be overruled and an exception noted.

Mr. Duane: Exception.

Mr. Riordan: Exception.

Mr. Colvin: If it please the Court—have we called the roll, gentlemen? For the sake of clarifying this for the jury and myself, may we have the last question and answer read to Mr. Nathanson?

The Court: Your last question was, you were asking him to state whether or not what was stated in that order was so. Counsel objected and said that called for the contents of the regulation, and I sustained an objection. That is as far as we got.

Mr. Colvin: Q. Mr. Nathanson, you are familiar with Maximum Price Regulation 193 in effect at the time of these sales which we have been discussing, that is, during the months of December 1943 and January 1944? A. Yes.

Q. Did that maximum price regulation allow for more than one price from the distiller to the wholesaler? [253]

Mr. Friedman: May I have that question read, your Honor?

(Question read.)

Mr. Friedman: I will object on the ground the regulation is the best evidence.

Mr. Riordan: Opinion and conclusion and no foundation laid.

The Court: Objection sustained.

(Testimony of Joseph N. Nathanson.)

Mr. Colvin: That is subject to a proper instruction on that matter from the Court to the jury.

The Court: You submit what you think the Court should instruct the jury as to the regulations, and if they are pertinent, the Court will instruct them that way. I do not think anything is gained by having the witness state what the regulations are.

Mr. Colvin: May I have Government's Exhibit 7 and 8? Q. Mr. Nathanson, I show you Government's Exhibit No. 7 and ask you to examine the same. You are familiar with this document, Mr. Nathanson? A. Yes.

Q. You are familiar with the data thereon? A. Yes.

(The Witness Continuing): I am familiar with Government's exhibit No. 8 and with the data thereon.

Q. Mr. Nathanson, I call your attention to Section 24 of the Alcoholic Beverage Control Act, said section being published at page 2017 of the California Code General Laws and Constitution, 1941 Supplement of Deering, published by Bancroft and Whitney Company, and ask you if you are familiar with that section? Counsel for the defendant Goldsmith objected to the question upon the ground that the same was incompetent, irrelevant and immaterial. The Court overruled the said objection, to which counsel for all of the defendants duly Excepted. [254]

(The Witness Continuing): I am familiar with Maximum Price Regulation 445 published at 8

(Testimony of Joseph N. Nathanson.)

Federal Register 11161. That Regulation establishes the maximum price per case for the sale by a wholesaler of a case of twelve bottles, each of which twelve bottles contains one-fifth of one gallon of Old Mr. Boston Rocking Chair Whiskey, distilled by Ben Burke, Inc., said sales occurring during the months of December, 1943 and January, 1944 in this district and relating to transactions recorded in this freight bill which I have examined. Counsel for the defendant Feigenbaum objected to the question on the ground that the Regulations were the best evidence. Thereupon, counsel for the Government, Mr. Colvin stated that the Maximum Price Regulation as to wholesale sales of distilled beverages in this district was not fixed by one single regulation but by formula, that there were really four components in that formula, the first, or No. 5 under Maximum Price Regulation 193 which sets the maximum cost to the wholesaler at \$19.24, the second component being the local tax which arises under Section 24 of the California Alcoholic Beverage Act, which sets the price for twelve $1/5$ bottles of distilled beverage at \$1.92, and that the next element of the price arose from the actual freight charge which, in this case, was 81c. Counsel for the defendant Blumenthal objected to the statement upon the ground that counsel for the Government was stating evidentiary matter and assuming matters not in evidence. The Court stated that the jury should not take into account the statements of counsel as to

(Testimony of Fred A. Sander.)

is similarly a summary of Forms 52-A and 52-B. On page 1 thereof is a record of the purchase of 1964 cases of whiskey from the Penn Midland Import Company of New Jersey, the distiller being Ben Burke, Inc., and the railroad car being given as 174149.

These three Manila envelopes, Exhibits 4, 5 and 6, are also Forms 52-A and 52-B. The only purpose for which they are admitted is to show that there is no record of 52-A and 52-B of the Francisco Company of Old Mr. Boston Rocking Chair Whiskey from the date beginning March, 1942, to the beginning of December, 1943. Government's Exhibit No. 7 is an exact copy of a freight bill order upon Penn Midland Import Company, concerning 2076 cases of liquor, alcoholic whiskey and "Francisco Distributing Company" appearing thereon, and the freight bill being \$1689.99. Government's Exhibit No. 8 is a freight bill, copy of the original order on Penn Midland Import Company, Francisco Distributing Company, showing the number of packages, articles and marks, 1964 cases 4/5 quarts Rocking Chair Whiskey. The amount of freight to be charged is \$2065.79 net, car initials B&O 174149. This document relates to the Penn Railroad car 568500 and is a copy of the San Francisco Warehouse Company's receipt for 650 cases of Old Mr. Boston Rocking Chair Whiskey, which were part of a shipment, and being Exhibit No. 9.

Exhibit 17 is a sheaf of invoices, instructions and records of serial numbers, and are the distribution

(Testimony of Fred A. Sander.)

of various cases of whiskey by San Francisco Warehouse Company.

Exhibit No. 11 regards the instructions and invoices as to the 650 cases already mentioned in Exhibit No. 9, which 650 cases were in the car PRR 568500.

Exhibit No. 12 is the record of the receipt by the San Francisco Warehouse Company of 1964 cases of fifths of Old Rocking Chair Whiskey. - Exhibit No. 13, the invoices, the serial numbered records and the copy of the bill of lading arising from the dealings of the San Francisco Warehouse Company with B&O car 174149.

Exhibit No. 14 completes the car B&O 174149 and is a record of the remaining 539 cases, that record being a copy of the invoices and records of the serial numbers of the cases and copy of the bill of lading which was a part of the transaction relating to this whiskey of the San Francisco Warehouse Company.

FRANK DITO

called as a witness for the Government and having been first duly sworn, testified:

Direct Examination

By Mr. Colvin:

I am assistant cashier and chief clerk at the Bank of America, 9th and Market branch. I have been

(Testimony of Frank Dito.)

so employed 22 years. During the months of December, 1943, and January, 1944, I was chief clerk. I am in charge of the entire branch. The Francisco Distributing Company had an account at that branch during the period of time to which I have just alluded. The signature cards relating to that account were kept as accounts in the records of the bank under my direction and supervision. I am here pursuant to a subpoena from the clerk of the [247] District Court which directed me to bring a signature card or cards with me. (The signature card was marked U. S. Exhibit 15 for identification.

The Witness: (Continuing) The subpoena directed me to bring with me certain collection records in my branch of the bank relating to the Francisco Distributing Company, the transactions taking place during the months of December 1943 and January 1944. The first one in point of time is November 29, 1943. Collection record No. 321984 which bears the date 11/29/43 in typewriting and the mark "Paid Dec. 15, 1943" is the original record of my bank kept under my direction and supervision and taken from the files by myself. (Thereupon the said document was marked U. S. Exhibit 16 for Identification. Collection record No. 610004 now shown me, dated in typewriting December 4, 1943, marked "Paid Jan. 3, 1944," is a record of my bank kept under my supervision and taken from the files by myself. (The document was marked U. S. Exhibit 17 for identifica-

• (Testimony of Frank Dito.)

tion.) Pursuant to the subpoena I was directed to bring certain account records of the Francisco Distributing Company. I have brought them. These are for the months of November and December 1943 and January 1944. Those were the months during which the collection records came into possession of my bank. The account record now shown me for November of 1943, Francisco Distributing Company, 122 Tenth Street, San Francisco, California, was kept under my direction and supervision in the regular course of business by the bank, and I brought it from the file myself and my answer would be similar as to the documents bearing the dates of December 1943 and January 1944. (The said documents were marked U. S. Exhibits 18, 19 and 20, for identification.) My attention being called particularly to Government's Exhibit 16 for identification, I have an independent recollection of that transaction. We register on our [248] collection form, and then we either call or send a notice. The first thing we do is write the collection upon our collection record, which is this form here. I did that in this particular case. I sent a notice to the Francisco Distributing Company. Government's No. 16 and Government's No. 17 were handled separately. As to Government's No. 16, the notice was sent right to the Francisco Distributing Co.

Q. Did Mr. Goldsmith visit the bank with reference to this transaction?

Counsel for the defendant Goldsmith objected

(Testimony of Frank Dito.)

to the question upon the ground that it was leading and suggestive, the court overruled the said objection, to which ruling counsel for the defendant Goldsmith duly Excepted.

A. I did.


Mr. Colvin: Q. What happened, Mr. Dito?

A. The draft was paid.

Mr. Friedman: Just a moment. Now I am going to object on behalf of the defendant Feigenbaum, on the ground that any transaction with the defendant Goldsmith in the bank out of his presence in which there is no showing he is connected is not binding upon him.

The Court: The testimony will be admitted as against the defendant Goldsmith.

The Witness: (Continuing) Mr. Goldsmith directed that the draft should be paid. Mr. Goldsmith directed me that the draft named in Government's Exhibit No. 17 be paid. I had no dealings with Mr. Weiss during that period of time. Subsequent to that direction the account of the Francisco Distributing Company was charged with the amounts of the two drafts, and the sight drafts were released to Mr. Goldsmith. [249]



JOSEPH N. NATHANSON

called as a witness on behalf of the Government,
and having been first duly sworn, testified:

Direct Examination

By Mr. Colvin:

I am Price Specialist for the San Francisco District Office of the Office of Price Administration. I have been so employed from October 1942 up to the present time. As a price specialist, I have acted in setting up and interpreting a price with relation to the alcoholic beverage regulations and drugs and chemicals. I am familiar with Government's Exhibit No. 2 and with the data therein contained. I am familiar with Government's Exhibit No. 3, and particularly with the data contained on page 1, after the first page. I am familiar with Order No. 5 under M.P.R. 193, published in 8 Federal Register 6866, which is now shown me.

After discussion between counsel and the court, the following proceedings occurred:

The Court: I will instruct the jury at the present time that pursuant to the authority given to him by statute, the Price Administrator on May 22, 1943 promulgated an Order No. 5 in which he fixed the maximum prices for all sales by Ben Burke, Inc., Foster & Company, and American Distilling Company as follows: That on or after May 24, 1943 Ben Burke, Inc., Boston, Massachusetts, Foster & Company, New York City, and American Distilling Company, Beacon, Illinois, may sell and deliver to any person, and any person may buy

(Testimony of Joseph N. Nathanson.)

and receive from those sellers Old Mr. Boston Rocking Chair whisky, a blend of straight Bourbon whiskies, 80.6 proof, aged as above, at the [250] following prices: \$19.24—that is not in issue; that is another kind of whisky?

Mr. Colvin: That is for pints.

The Court: \$15.37 plus \$3.87, being the amount of the increased Federal excise tax of November 1, 1942 applicable thereto, or a total of \$19.24 per case of 12 bottles, each bottle containing one-fifth gallon of such whisky.

Now, do you wish to take an exception to that?

Mr. Friedman: Yes, your Honor. I wish to object to what your Honor has told the jury, and I ask your Honor to instruct the jury to disregard anything you have just read from the Federal Register or advised them about, upon the following grounds:..

First, that the purported order is only an order that regulates processors of these particular distilled spirits; it has nothing to do with wholesalers; it has nothing to do with people who buy from wholesalers or jobbers—that is, the portion you have instructed the jury about—and therefore that this portion of the order is not binding upon Mr. Feigenbaum in this case, who is neither a processor nor a wholesaler of distilled spirits.

Secondly, upon the ground that the order on its face is in violation and in excess of the power conferred by the Emergency Price Control Act for these reasons: That under the Emergency Price

(Testimony of Joseph N. Nathanson.)

Control Act the Administrator has the power by general order and by general order only to fix the prices of any commodity within a particular area or region, and that he has not the power and never was given the power by Congress to fix different prices for different people for the manufacture of the same kind of article, and this is a special order applicable only to certain people. [251]

The Court: Do you propose to follow this up with further regulations with respect to the prices fixed for sale at wholesale?

Mr. Colvin: Yes, your Honor.

The Court: And this is preliminary to that?

Mr. Colvin: Yes, your Honor.

The Court: I will overrule the objection, and an exception may be noted.

Mr. Duane: If the Court please, in behalf of the defendant Goldsmith I desire to offer the objection that this testimony and this regulation for this purpose is incompetent, irrelevant and immaterial. We are not here charged with any dealings with Burke or the American Distillery or anyone else.

The Court: I understand that.

Mr. Duane: We urge our objection on that ground.

The Court: I have instructed the jury as to that regulation and overrule the objection upon the statement of the District Attorney that it is preliminary to showing a further price regulation for sales by wholesalers. There may be some connec-

(Testimony of Joseph N. Nathanson.)

the evidence unless satisfied that counsel was correctly stating the evidence, but that the Court assumed that Counsel for the Government was trying to explain the Regulations that fix the price, which was the price charged by the distiller to the wholesaler, plus the California Tax [255] plus the freight. Counsel for the Government stated that the statement of the Court was correct, and that, taking the three components, Regulation MPR 445 section 5.4 provided the multiplication of those component parts by 1.15 in order to establish the maximum wholesale price in this district, arising from the freight charge, the tax and the maximum cost to the wholesaler.

Mr. Colvin: Mr. Nathanson, how do you calculate the price as to Old Mr. Boston Rocking Chair Whiskey distilled by Ben Burke and Company for cases of fifths, which were shipped as recorded in the freight bills which are Government's Exhibits No. 7 and 8 in evidence? Counsel for the defendant Feigenbaum objected to the question but, before the objection was completed, the Court stated that the evidence was being admitted only as against the defendant Goldsmith. Counsel for defendant Goldsmith objected to the question upon the ground that the matter was one of calculation, and that many persons would not understand how to make the calculation. The Court overruled the objection, to which ruling of the Court counsel for the defendants duly Excepted.

(The Witness Continuing): The wholesaler's

(Testimony of Joseph N. Nathanson.)

price to the retailer under Maximum Price Regulation 45 is based upon the percentage mark-up of 1.15 on his net cost. The net cost has three elements. The first is the net purchase price through November 2, 1942; the next item is the freight from the shipping point to the receiving point; the third element of cost is the State Excise Tax. In this instance the price from the distiller to the wholesaler through November 2, 1942, was \$19.24; because that reflects the increased taxes of November 1st, 1942. The freight to San Francisco per case [256] is 81c. The State Excise Tax on a case of fifths, \$1.92, making a total of \$21.97. Then, we apply the percentage markup that is allowed the wholesaler, multiply that, 1.15 or \$21.97, which gives the total sum of \$25.27 per case. That would be the price from the wholesaler to the retailer FOB San Francisco for the particular merchandise.

Cross Examination

By Mr. Duane:

After I get all through with these calculations, I conclude that the selling price for this particular whiskey at the time referred to is \$25.27. However, if it were sold by the wholesaler to the retailer for \$24.50, it would be sold considerably under the selling price.

CECIL F. COUGHLIN

called as a witness by the Government and, having been first duly sworn, testified:

Direct Examination

By Mr. Colvin:

I am Deputy County Clerk of San Francisco. I came here today pursuant to a subpoena which directed me to bring File No. 20775 in the office of the County Clerk. I have brought that document with me. The document in question was marked U. S. Exhibit 21 for identification.

NORMAN REINBURG

called as a witness by the Government and, having been first duly sworn, testified:

Direct Examination

By Mr. Colvin:

I have a restaurant in Vallejo with a saloon license named Dopey Norman's. I operated that restaurant and bar [257] during the month of December, 1943 and the month of January, 1944. During that period of time, I purchased some cases of Old Mr. Boston Rocking Chair Whiskey in denominations of fifths. I made two such purchases. It was purchased from the Francisco Distributing Company. I had a conversation regarding the purchase of the first quantity of whiskey with Mr.

(Testimony of Norman Reinburg.)

Abel, the gentleman whom I see there in the grey suit. (Indicating the defendant Abel.)

Counsel for the defendants Goldsmith and Blumenthal objected to the testimony upon the ground that it was not binding upon the said defendants, and the Court stated that, for the present, the testimony would be admitted as against the defendant Abel only.

My first conversation with Mr. Abel regarding Mr. Boston Rocking Chair Whiskey was early in December, the 6th, or 3rd or 4th, and took place on the sidewalk in front of my place. Just myself and Mr. Abel were present. All I talked about was 100 cases of whiskey. He wanted to sell me the whiskey. We dickered about the price of it, and finally arrived at a price of \$65.00 a case. I did not pay any money to Mr. Abel at that time. I later gave him a check for \$2,450 for the first 100 cases of whiskey. After the man gave me the bill for it, I know the money had been received directly, I gave him the rest of the money which totalled \$6,500 for the first 100 cases. Mr. Abel gave me the bill. The document now shown me marked U. S. Exhibit 22 for identification entitled "Francisco Distributing Company No. 10090, San Francisco December 17th, 1943" is the invoice to which I just referred. I gave the check in this case to Mr. Abel about the 6th or the 3rd of December. That check was made out to this letterhead here, Francisco Distributing Company. I made out the check myself. At Mr. Abel's direction I made it

(Testimony of Norman Reinburg.)

[258] out to the order of the Francisco Distributing Company and the amount of that check was \$2,450, as I stated. I made it out for \$2,450 at Mr. Abel's direction.

Q. At the time you gave the check to Mr. Abel what was said with regard to the payment of cash?

Counsel for the defendant Abel objected to the question upon the ground that the same was leading and suggestive. The Court overruled the said objection, to which counsel for the said defendant Abel duly Excepted.

The Witness: That I pay the balance in cash upon receipt of the bill.

Mr. Colvin: Q. Did Mr. Abel say that was the selling price, \$2,450? A. Yes.

Counsel for the defendant Abel objected to the question upon the ground that the same was leading. The Court overruled the said objection, to which counsel for said defendant duly Excepted.

(The Witness Continuing):

Mr. Abel did not tell me where the whiskey was coming from. The only thing said regarding the whiskey at the conversation at which I gave Mr. Abel the check was about the cash. The cash was to be delivered when he gave me the bill. He told me it would come from the Francisco Distributing Company. That was the complete content of that conversation with Mr. Abel.

Q. Were 100 cases of Old Boston Rocking Chair Whiskey delivered to you?

Counsel for the defendant Blumenthal objected

(Testimony of Norman Reinburg.)

to the question upon the ground it was incompetent, irrelevant, immaterial and called for the opinion and conclusion of the witness. The court overruled the objection, to which counsel for the defendant Blumenthal duly Excepted. [259]

(The Witness Continuing):

I got the whiskey. I made a second purchase of Old Mr. Boston Rocking Chair Whiskey during the month of December, 1943. I purchased that whiskey from the same people, the same channel, the same man. I paid for that whiskey exactly as the other, \$2,450 by check and the rest by cash. It totalled \$65.00 per case. I had the same conversation as before with Mr. Abel regarding this transaction. It took place around the 13th or 14th of December, right in front of the place of business. No one else was present beside myself. The conversation was the same thing, the 100 cases for the same price. Mr. Abel said the same as he did on the first 100 cases, repeated the same thing. Abel wanted to sell me 100 cases of whiskey, and I wanted to buy 100 cases of whiskey. The price was \$2,450 by check, which was the ceiling price. I gave him the check; I got my bill, and when I got my bill I gave him the rest of the money totaling \$65.00 for each case. The rest of the money was paid by cash; that cash was delivered to Mr. Abel. The whiskey was subsequently delivered to me. This invoice now shown me headed "Francisco Distributing Company No. 10140" is the invoice covering the second sale of whiskey by Mr.

(Testimony of Norman Reinburg.)

Abel that I have recounted. That whiskey arrived around January 6th or 7th. The document referred to was marked U. S. Exhibit 23 for identification.

(The Witness Continuing):

During this period of time I traveled to San Francisco with Mr. Abel on two occasions. The first occasion was about the 6th or 7th of December. I took Mr. Abel with me in my car. I took him in the downtown section here about three or four blocks off Market, around Third or Fourth. The place was a jewelry store pawn shop, sports goods. [260] I let Mr. Abel off at this sports goods shop. I had a conversation that I would pick him up there in half an hour. I drove down there on the date of the first trip at Mr. Abel's direction. He did not say to drive to this particular sports goods shop; he said "up that street, down that street and stop here".

Counsel for the defendants Abel and Blumenthal objected to this testimony. The Court overruled the objection, to which ruling counsel for the said defendants duly Excepted.

(The Witness Continuing):

I subsequently, pursuant to the arrangement which I had made, came back and picked Mr. Abel up and brought him back to Vallejo. I did not have a conversation with him regarding his trip to that place. I made a second trip to San Francisco with Mr. Abel about the 16th or 17th of De-

(Testimony of Norman Reinburg.)

cember. I traveled to San Francisco the same way, in my car. I took him over and brought him back. I took him to the same section of the city, about three blocks off Market, about Third Street there. I observed Mr. Abel going in this pawn shop and sports shop, which I named. I did not have any conversation with him regarding taking him to that place on the way down; just that I would meet him there. He said he would meet me at the same place, dropping him off at the same place, that was all. I picked him up about a half hour later and brought him back to Vallejo, just as I did before. In the meantime I was around town, just waiting. I made more trips to San Francisco during the month of December. I came over and tried to get some more whiskey without paying that price. I went to the Francisco Distributing Company. That was around the 10th of December. It was after the first [261] trip I made and before the second one to the Francisco Distributing Company. The same man was behind the counter. He wouldn't give me any business at all. I do not see that man in the court room. I did not make a purchase of any whiskey at that time. After visiting there, I went down to the pawn shop where I left Mr. Abel off on the first occasion of my trip to San Francisco. I went into the pawn shop. I tried to do business with whiskey and nobody talked to me. They weren't interested. I do not remember what person I saw in that pawn shop. I was unable to do

(Testimony of Norman Reinburg.)

any business at the pawn shop. They did not say that they sold whiskey there. They didn't know what I was talking about. At that time I returned to Vallejo.

Cross Examination

By Mr. Wolff:

The pawn shop that I went to where the parties said they did not know what I was talking about was the same place where I had taken Mr. Abel on two occasions. I do not operate my business under any other name than Dopey Norman's. It was "The Brig" when I bought it in 1941. I operated a restaurant there with a liquor license; I did not have gambling. I had a conversation with Mr. Abel on the sidewalk in front of my place of business some time in the forepart of December, 1943. Mr. Abel is always on that street. He is in the jewelry business and is up and down that street quite often. Mr. Abel was working for a Mr. Davis, who had a jewelry store there about three quarters of a block from my place. I met Mr. Abel on the sidewalk in front of my own place, I am sure of that. My place is closed until about 5:00 o'clock in the afternoon, and we go out and walk up and down and get a little sunshine and see who is who and why, and I spent that recreation time right on that sidewalk, and Abel is usually along all the time. Both of us were taking a sort [262] of a sun bath, and in the course of this perambulation I met Abel in front of my place

(Testimony of Norman Reinburg.)

of business. I had no previous appointment to meet him there, it was just in the ordinary course of operations of walking back and forth. I was anxious to get liquor when I met Mr. Abel on this first occasion in the forepart of December, 1943. I don't know what to tell you was the first thing Mr. Abel said. I am the man who hollered for the whiskey. I needed the whiskey. I was out of whiskey entirely. When I met Mr. Abel in the course of this walking, I told him I was anxious to get whiskey. I told the man I was practically out of whiskey. I didn't have any more whiskey. In response to that Mr. Abel said, "I think I know some place where you might get some". I don't know whether he mentioned Mr. Davis. He said, "Perhaps I can get you some whiskey". Mr. Abel never delivered any whiskey to me. I said in my testimony I gave Mr. Abel some checks, or a check. I gave him one check for each of us. They were for \$2,450. I don't know who cashed the check. It was made out to the distributing company. I gave that check to Mr. Abel. Mr. Abel said to me, "I will look around and try to get you some liquor, Norman". He went out of his way two or three times to get me whiskey, and he couldn't do it because it wasn't a legitimate setup. We both turned it down, and when he came along with this Francisco Distributing Company I accepted it because he had a bill which was correct with the state law. On two or three occasions, Mr. Abel went to get some liquor, and we both turned

(Testimony of Norman Reinburg.)

it down because it didn't look like it was a legitimate deal. In other words, Mr. Abel was trying to do me a favor, all the way through. He wasn't in the liquor business. He was associated with the liquor business. He knew what he was talking about; he knows brands; he knows about whiskey. He says he was with a company up in Stockton that [263] sold whiskey before that he was friendly with. Whether he worked there or not, I don't know, and he never said either whether he worked there, or whether they were just friends. He told me he was a jewelry salesman. He likes his job, but he would try to help me get a little whiskey. On the first occasion that I drove Mr. Abel over here, I did not see him go into any particular place. The second time, I drove him to the same place, drove off and went away. At the corner, I did not see him go into any place, and I came back to that corner and picked him up on both occasions. I did not have any conversation with Mr. Abel as to where the check was going to be placed. He said he would take the check over and try to get a bill for the whiskey. That check for \$2,400 was on the basis of \$24.50 per case. When it came to the matter that he gave me some cash, he told me where that was to go; it went where the whiskey is. I don't know whether he kept any of it, that is his business. He did not ask me for anything personally. I have a check book in my office. This check for \$2,450 that I say I gave to Mr. Abel on the first purchase and the second purchase came

(Testimony of Norman Reinburg.)

back from the bank. I do not have them in my possession. I gave them to the State Board man in Vallejo, Mr. Patterson.

In response to a question by Mr. Wolff, Mr. Colvin stated the Government did not have the checks in its possession. The first check was made payable to Francisco Distributing Company, and the second check exactly the same. I testified on direct examination that I went to the Francisco Distributing Company in an endeavor to purchase some liquor and at that time I was not able to make any such purchase. I went there alone. I also testified that I went to a place which I designated as a pawn shop. At that time I sought to [264] make a purchase of some liquor. When I went over there I went alone.

Redirect Examination

By Mr. Colvin:

Mr. Davis runs a place of business in Vallejo which is in the same block as my place of business; that place of business is a jewelry store and pawn shop. This store in San Francisco on Third Street, to which I have referred is a sports goods store. It had things in the window; it had fishing poles with Neon lights. It is on this side of Market Street, the same side we are on now.

(Testimony of Norman Reinburg.)

Recross Examination

By Mr. Riordan:

I have testified that that whiskey was Old Mr. Boston Rocking Chair Whiskey. It was really very good whiskey, it was all right. I don't always rely on the label.

JOHN GIOMETTI

called as a witness on behalf of the Government, and having been first duly sworn, testified:

Direct Examination

By Mr. Colvin:

I have the Owl Cafe, 121 Georgia Street, Vallejo, California, and hold a liquor license at those premises. I was in that business during the month of December, 1943, and the month of January, 1944. During those months, I purchased some Old Mr. Boston Rocking Chair Whiskey from The Francisco Distributing Company. I paid \$65 a case for that whiskey. I gave a check to Norman Reinburg and the cash, and he got me the whiskey.

Counsel for the defendants Blumenthal and Feigenbaum objected to the evidence as not binding upon the said defendants, [265] and the Court stated that it was admitted only as against the defendant Goldsmith. Counsel for the defendant Goldsmith objected upon the ground that there was

(Testimony of John Giometti.)

no foundation for the testimony as to the defendant Francisco Distributing Company, and no evidence containing it, so that the witness Reinburg repeated the same, and the Court struck out the testimony of the witness that he made the purchase from the Francisco Distributing Company.—

(The Witness Continuing):

I purchased 50 cases of Old Mr. Boston Rocking Chair Whiskey. I had the conversation regarding the purchase of the whiskey with Norman Reinburg. The conversation took place early in December of 1943—say the 6th or 7th. Just Mr. Reinburg and I were present. The conversation took place at Norman Reinburg's place of business. Subsequent to that conversation, 50 cases of Old Mr. Boston Rocking Chair Whiskey were delivered to me, I would say, in February, 1944. I seen the invoice now shown me entitled "Francisco Distributing Company No. 10171". I saw that when I got the delivery of the whiskey. The Kellogg Express Company gave me the bill and the invoice; that invoice was kept by me as a record of my business, directly under my care and custody. That is the shipping bill to which I have referred. The shipping bill and the invoice were delivered to me together. The said invoice was marked U. S. Exhibit 24 for identification and the shipping bill, U. S. Exhibit 25 for identification. I gave the check and the cash for the whiskey to Norman Reinburg. The check was made out to Francisco Distributing Company. It is not in my possession.

(Testimony of John Giometti.)

I got this cashier's check from the Bank of America and paid \$1,225 for it. I gave the check to Mr. Norman Reinburg. [266]

Q. At that time, did you give any cash to Norman Reinburg?

Counsel for the defendants Goldsmith, Abel and Feigenbaum objected to the question upon the ground that the evidence was not binding upon the said defendants. The court overruled the said objection, to which ruling of the Court counsel for the defendants duly Excepted.

The Witness: I gave him the balance of the \$65 a case.

(To the Court): \$2,025.

Subsequent to that time I had a conversation with Mr. Louis Abel regarding this transaction. I would say the conversation took place after I received the first shipment, I would say a couple of months after I received the whiskey previously. He had a jewelry store in front of Mr. Norman Reinburg's place. The conversation took place inside of the jewelry store. Beside Mr. Abel and myself, some fellow was present representing Hart's Distributing Company... That is a liquor company.

Mr. Colvin: Q. What was that conversation with Mr. Abel regarding your purchase of this whiskey?

Counsel for the defendants Goldsmith and Abel objected to the question, the former on the ground that it was incompetent, irrelevant and immaterial,

(Testimony of John Giometti.)

and counsel for the defendant Abel objecting upon the same ground and upon the further ground that it was not within the issues of the subject-matter of the conspiracy charged in the indictment, for the reason that anything that the defendant Abel may have said, if it was subsequent to the conclusion of the transaction, would not be within the issues, and would not be competent or pertinent after the transaction had been concluded. [267] The court overruled the said objection, to which ruling counsel for the said defendants duly Excepted.

The Witness: He said he could get me some whiskey if I wanted to get it, and he said he could probably get it a little cheaper, and in that way—well, he would save me \$5 a case; \$60 a case, so I told him I paid \$65 a case for it once, and I wouldn't go for it again. That was all that was said. He said the whiskey I got at Francisco Distributing Company went through his hands, and he could get me the same deal. He said he just took the money I gave Norman Reinburg, the money I gave to Norman Reinburg was given to him, and he took it to the "big shot", and he could get me the figure of \$60 a case, and I wouldn't go for it no more because I figured I was paying too much for it in the first place, and I didn't think I would get a legitimate bill. He did not say who the "big shot" was. He said the "big shot" was in San Francisco.

Examination by Mr. Wolff:

I had my first conversation with Mr. Reinburg

(Testimony of John Giometti.)

about the purchase of any liquor after he got his shipment, I would say in the latter part of December, 1943. I met Mr. Reinburg at his place when I had this conversation with him about the purchase of the liquor. I was there for the purpose of enlisting him to get me some liquor. Just Mr. Reinburg and I were present. He said he just got some whiskey, and he would help me out to get some for me. I did not ask him to get me some whiskey. I went over there. We were talking about the whiskey situation, and everybody was out of whiskey, and he said he just got some whiskey, and he would try to get me some. I went over there for the purpose of asking him to try and get some whiskey for me. That is [268] when the conversation started. I said I would like to get some whiskey. I told him I would like to get 50 or 100 cases, whatever he would get for me. I did not tell him the type of whiskey, I didn't care, anything. I asked him how much it would cost. I did not tell Mr. Reinburg what price I wanted to pay or make any statement in connection with that subject-matter. He told me it would cost \$65 a case to get the liquor. I told him I was satisfied as long as I got a legitimate bill. The amount of the legitimate bill was \$24.50 a case. By legitimate bill, I mean you have to have a bill for your whiskey. I mean I wanted a bill for the whiskey. After I got the bill for the whiskey, the bill was \$1225. The Kellogg Express Company delivered it to me. When they delivered it to me I did not

(Testimony of John Giometti.)

give them any money. I went over and saw Reinburg again. I did not take the money for the liquor over to him. I had already given him the money before I got the whiskey. I gave it to him in advance. I gave him a check and cash, and they delivered me that in January, 1944, about fifteen days before that. I got the bill with the delivery. He told me he made his out to Francisco Distributing Company, and he told me to do the same. Then I went to the bank and got a cashier's check, and that was at least fifteen days in advance of the time the whiskey was delivered. I told Mr. Reinburg then "Here is a check and money", and he says, In at least fifteen days I would get my whiskey. I waited fifteen days and I got the whiskey. That is all I knew about it. The conversation that I testified to that I assert I had with Mr. Abel took place approximately two months or more subsequent to the time I got the delivery of the liquor. I didn't have a conversation with Mr. Abel on the matter until some time in March or April, 1944. I didn't go to his place of business to [269] see him, I just happened to be in there. There was no transaction at all, I just happened to be in his place. Mr. Abel told me that he knew I had gotten some liquor through Mr. Reinburg. He says to me, "Here is a fellow who can get some whiskey, and he got some previous to that"—that he had something to do about it, he knew where he got it, and he could get me.

(Testimony of John Giometti.)

some more. I never got any more from that source. Mr. Abel did not get me the whiskey. I never gave Mr. Abel any money.

(To Mr. Riordan): I knew that man Norman got Rocking Chair Whiskey, so I knew I was going to get the same thing.

(To Mr. Wolff): I never talked about whiskey with Mr. Abel prior to this conversation I had in his store in March or April, 1944. He didn't work, he owned a place, it was a jewelry store. I do not know a man named Peter Davis. I have heard of him. I do not know him previously. I think he has a jewelry store in Vallejo, up the street. That is not the place to which I went when I met Mr. Abel. I went to 122 Georgia Street, right across the street from my place. My place is 121 Georgia Street, Vallejo. I went right across the street, and that is where Abel had his place. I didn't get to visit him at all. I just walked in the place. I have been in there one hundred times before, just walking over there, just look around, kill time, and go back to work. Most of the time Mr. Abel and his wife are operating or conducting the place. I was in there numbers of times. I didn't say that I was on very definite acquaintanceship with him. It is more neighbor, more than anything else. You know a fellow, you go over and see him. I knew Mr. Abel before that. I had never had any transactions with him. I would say it was a social [270] relationship. I just went over there to say hello to him. I was friendly with the man.

VICTOR FIGONE

Called as a witness by the Government, and being first duly sworn, testified:

Direct Examination

By Mr. Colvin:

I have a cafe and saloon combined at 455 San Pablo Avenue in El Cerrito. I have been in that business since November 11, '33, and was in that business during December of 1943 and January of 1944, and held a liquor license at that place. During the month of December 1943 I made a purchase of Old Mr. Boston Rocking Chair Whiskey. I purchased the whiskey from some gentleman in the Francisco Distributing.

Counsel for the defendant Goldsmith objected to the question upon the ground that the foundation therefor had not been laid, and counsel for the defendant Blumenthal objected upon the ground that it was not binding upon the said defendant and as to him was hearsay.

The Court stated that the evidence would be admitted only as against the defendant Goldsmith.

The Witness: (Continuing) I understood that the man's name was Weiss.

Counsel for the defendant Goldsmith moved that the answer be stricken as to the defendant Goldsmith, on the ground that it was not connected with said defendant, and the Court Overruled the Objection, to which ruling counsel for the defendant Goldsmith duly Excepted.

(Testimony of Victor Figone.)

The Witness: (Continuing) At that time I did not make a purchase of whiskey over at the Francisco Distributing Company. At that time I had met this man and they told me that [271] the whiskey was not in, would be in a few days, so I went again. I later made a purchase at the Francisco Distributing of some Old Mr. Boston Rocking Chair Whiskey. I got 200 cases for myself, and then ordered 75 cases for Mr. Avila. He had heard I was over there to see if I could purchase some. The first time I went there I heard I could get whiskey at that time. The gentleman told me it would be available in two or three days, so when I went home that night Mr. Avila approached me and told me he had heard I was going to get some liquor, and asked me if I could get some for him. He told me he couldn't go over there. So I told him what I was to pay for it, and if he wanted me to get it for him I would, or would let him go with me, but he says he couldn't. Then there was a second visit when I actually bought the whiskey which I have discussed. I spoke to the same man on the occasion of both my visits. I do not see that man here in the courtroom. I have been looking here the last day or so. I have been here both days. I don't seem to see him. To my recollection—it was two years ago—there was a counter there. There were some shelves in there with some liquor in them. This fellow was standing in front of the counter. He was dressed—well, he was dressed, I would say, in a blue suit, and was a kind of short

(Testimony of Victor Figone.)

stout fellow, smooth-shaved fellow, a kind of a nice-looking fellow. When I walked in I stood there a couple of seconds, and this gentleman happened to walk over and ask me what I was looking for, or if I wanted anything, and I told him I had heard that there could be some whiskey obtained there, and I told him I was in business—at that time whiskey was hard to get, so you just had to go out and work to buy whiskey. He told me that he thought that there would be a car in in a few days. I told him, would there be any chance of me obtaining any? He [272] told me Yes, to come back in a couple of days, that he was sure it would be in. I would say the date of the earlier conversation was in December, around the 27th or 28th. There were two fellows at the Francisco Company, sitting in there, but I didn't see their faces. I did not pay any money to that man on the occasion of my first visit. The second visit I took over a check for my whiskey, \$4900, and also a check for Mr. Avila made to the Francisco Distributing Company, the same as I had made mine. I went there on the second trip and I told Melvin Avila to come over with me, but he said he couldn't, never had a bartender. I would say the date of my second visit was about the 29th or 30th. On that occasion I had a check made out when I went to the company. I think my check was \$4900. The check now shown me, entitled "90-1208, Emeryville Branch Bank of America," is the check I took with me on the occasion of my second visit. That check

(Testimony of Victor Figone.)

was made out before my arrival there. That check was made out December 29th; it must have been the 30th or 31st, because it was a day later than the time I made out the check. This fellow that I had talked to there had told me to make the check out for \$4900 for the 200 cases and then the other in cash to bring over. The other in cash was the balance to make up \$60 a case. I was paying \$60 a case for the whiskey that I bought. I brought that amount of cash with me. That cash would come to something like \$5100; I am not sure of that. I gave the check and the cash to the same fellow that I had met the first time. Beside this man and myself there was no one there on the occasion of the second trip. On the first trip was when I seen the other two gentlemen there. No one else was there at the time of the second trip unless they were in the back; there was only this one fellow. That whiskey was subsequently delivered to me around January 3d or 4th. I recognize the invoice [273] now shown to me, entitled "Francisco Distributing Company No. 10145." This here was mailed to me after I had received the whiskey; a day or so after I had received the whiskey. It was mailed to me, "Paid." We hold all our receipts for anything we buy. I do that in the regular custom of my business. We always keep duplicates of them in the place and then at our book-keeper's office.

The check was marked U. S. Exhibit 26 for iden-

(Testimony of Victor Figone.)

tification, and the Invoice referred to by the witness was marked U. S. Exhibit 27 for identification.

The Witness: (Continuing) After that time I went back later to the Francisco Distributing Company and the place was closed. That was in the latter part of January, I think. It may have been in February. This man with whom I dealt at the Francisco Distributing Company just said to make out the check to the Francisco for so much and then the other part in cash. I did not have any discussion with him about the ceiling price on this whiskey. At that time whiskey was hard to get, and I knew that the price was a little over, but I didn't discuss it with him. I wouldn't say the word "ceiling price" was used, because I don't care at that time, and he told me he billed it to me at \$24.50, but he didn't say the ceiling, I am sure.

Cross-Examination

By Mr. Weiss:

Like I say, I have been looking yesterday and today, and this man I dealt with was a short stout fellow. That man told me he was Mr. Weiss. I would recognize him if he was in this courtroom, but he is not in here. I was told and believed that I paid some money to a man by the name of Weiss [274] at the Francisco, that this man was Mr. Weiss. I cannot say, because at the time I bought the whiskey this gentleman told me that, and I noticed the billing showed the salesman Weiss. I overheard that night over in a saloon in the Inter-

(Testimony of Victor Figone.)

national Settlement that there was a salesman by the name of Mr. Weiss. I cannot identify Mr. Weiss.

Redirect Examination

By Mr. Colvin:

I don't think I heard at the time that Weiss was at the Francisco Distributing Company, I just overheard that conversation and went down there, that's all.

MELVIN AVILA

Called as a witness for the Government, being first duly sworn, testified:

I have a tavern and restaurant, the Cerrito Club, in El Cerrito. The address is 448 San Pablo Avenue. I hold a liquor license at that place. During the months of December 1943 or January 1944 I purchased 75 cases of Old Mr. Boston Rocking Chair Whiskey. All my dealings were with Mr. Figone. I paid \$60 a case for the whiskey. That payment was by some odd \$1800 by check; the rest of it cash. I delivered that check and cash to Mr. Figone. Subsequently I received the whiskey. A big dual truck came on January 3 and Vic helped me unload mine and I helped him unload his. An invoice of that whiskey came by mail within the following week, sometime, I don't remember exactly when, billed "Francisco Distributing Company." The [275] check had been made payable

(Testimony of Melvin Avila.)¹
to Francisco Distributing Company. I never went over to the Francisco Company.

Counsel for the defendant Blumenthal moved that the testimony be excluded as to the defendant Blumenthal, as not binding upon him, and the court stated that it was admitted as against the defendant Goldsmith.

Counsel for the defendant Goldsmith objected to the testimony on the ground that it was hearsay, and incompetent, irrelevant and immaterial as to the defendant Goldsmith.

The Court Overruled the said Objection, to which counsel for the defendant Goldsmith duly Excepted.

JAMES CERNUSCO

Called as a witness by the Government, and having been first duly sworn, testified:

Direct Examination

By Mr. Colvin:

I am in the tavern business and restaurant business at 747 Third Street, San Francisco. The name of that business is "Andy's Place." I was operating that business during the month of December 1943, and January 1944. During that period of time I engaged in the purchase of some Old Mr. Boston Rocking Chair Whiskey. I intended to buy some for myself and two friends of mine,

(Testimony of James Cernusco.)

Mr. John Vukota and Mr. Lewis, whose places of business were in Livermore. I made that purchase from the Francisco Distributing Company. I had a conversation with a [276] man in my place of business. He gave his name as Weiss or Wise or something. I do not see the man that I saw then here in the courtroom. I have been here for a couple of days, since yesterday, and today, and I have not seen him yet. I purchased whiskey at that time from that man. I gave the man a check for that whiskey. I believe Mr. Vukota has it in his possession, and Mr. Lewis has their checks in his possession. The checks of which I speak were delivered to that man some time in December. He came to my place of business. We drove up Mission Street, up to Third Street, between Mission and Market—I took the car there, the man got out, seemed to walk across the street. I am referring to the man who said he was from the Francisco Distributing Company. I think it was in the early part of January. He was driving the automobile. We stopped on Third Street, right near a little alley there, on the righthand side, going up Third Street toward Market. I stopped in Third Street between Mission and Market, right near an alley there. The fellow seemed to go across the street there. I don't know whether he went into the Sportorium or not.

Mr. Colvin: Q. At whose direction did you stop at that place on Third Street?

Mr. Riordan: I object to that as incompetent,

(Testimony of James Cernusco.)

irrelevant and immaterial as to the defendant Blumenthal. We are not bound by any directions.

The Court Overruled the said Objection of Mr. Riordan, to which Counsel for the Defendant Blumenthal Excepted.

The Witness: (To the Court)

The man who was driving the car stopped there. He was the man who said he came from the Francisco Distributing Company. I have seen the check now shown me, entitled, "Livermore Office, American Trust Company," made out to the [277] Francisco Distributing Company for \$450. I had this one myself. I got it from Mr. Vukota. I had given that check to the man who said he was from the Francisco Distributing Company. I gave one of these checks to that man in the early part of December, and one was in the early part of January. I gave one of these checks to that man on the day I took the ride along Third Street with him. I didn't give him the money on Third Street, though. We then drove, from Third Street we went down around Market, we came back around Second Street and then we went down near Townsend Street. Right there we parked the car and I gave him the money. I gave him the check for \$450. The check for \$2,000 was given to him the early part of December.

The check dated December 16 was marked U. S. Exhibit 28 for identification.

The check dated December 30 was marked U. S. Exhibit 29 for identification.

(Testimony of James Cernusca.)

The witness was shown a check headed "Mally's Grill, V. M. Lewis", dated December 14, 1943, to the Francisco Distributing Company, for \$2,000.00.

(The Witness Continuing):

I have seen that document before. I got this check from Mr. Lewis, and that is the check I gave the salesman. I also got from Mr. Lewis the check shown me entitled "Mally's Grill, V. M. Lewis" December 30, 1943 to the Francisco Distributing Company for \$450. The check dated December 14 was marked U. S. Exhibit 30 for identification, and the check dated December 30 was marked U. S. Exhibit 31 for identification. The check for \$2,000 dated December 14, marked U. S. Exhibit 31 for identification was given to the man who said he was a [278] salesman at the same time that the Vukota check for \$2,000 was given to him. Both of these checks were given at the same time. I gave Government's Exhibit for identification No. 29 and Government's Exhibit for identification No. 30 each for \$450 to the man who said he was the salesman at the same time. I gave that man the two \$450 checks on Townsend Street, near the Clark Draying Company. At the time I gave him the check I gave him \$6,100 in cash. We drove up Third Street, stopped for a while, and then, from there we came down to Townsend Street. I couldn't very clearly say what I was talking about at that time. I had a conversation the time I stopped on Third Street that day as to where the

(Testimony of James Cernusco.)

whiskey was, and he said it was in the San Francisco Warehouse.

Q. ~~And what did you say to that?~~

Mr. Riordan: I object to this on the ground it is hearsay as to the defendant Blumenthal. It is completely hearsay as to him.

Mr. Duane: We also object on the ground it is hearsay as to the defendant Goldsmith, some unidentified person with whom this witness talked. Certainly such testimony is hearsay.

The Court: Is there any connection, counsel, between these checks and the account record of the Francisco Distributing Company?

Mr. Colvin: Oh, yes.

The Court: Do you propose to tie that in?

Mr. Colvin: I propose to tie that in and bring the actual account records of the Francisco Distributing Company here, that is, their bank records which show the corresponding entries.

The Court: You wish this witness to testify as to a conversation with respect to these transactions in the whiskey? [279]

Mr. Colvin: Yes, your Honor.

The Court: I will overrule the objection and you may have an exception, counsel.

Mr. Duane: Exception.

Mr. Friedman: I understand that is limited to the defendant Goldsmith.

The Court: To the defendant Francisco Distributing Company—to the defendant Goldsmith.

(Testimony of James Cernusco.)

(The Witness Continuing):

Well, he says the San Francisco Warehouse. So we drove up the street, Third Street, and like I said, we stopped the car on Third Street between Mission and Market, and then from there we drove around and came back to Townsend Street, which the San Francisco Warehouse is right around the corner from Third Street, and then we went and seen that the whiskey was there, which it was, and from there on he said, 'Here is the bills for the whiskey,' and he wanted the money. So there we went back in the car, gave him the money, and he gave me the bill of ladings, I think they were, or bills of whiskey—I don't know what they were.

The Court: Q. You said you went to see if the whiskey was there?

A. He said it was in the San Francisco Warehouse; he had to get some bill of ladings, some receipts for the whiskey.

Mr. Colvin: Q. Did he tell you he had to stop on Third Street to get those?

Mr. Riordan: I object to that as leading, your Honor, putting words into the witness' mouth.

The Court: Where did he say he was getting the whiskey?

This invoice entitled "Francisco Distributing Company No. 10143" is the invoice he gave me at that time. [280] At that time he gave me this invoice Francisco Distributing Company 10144. These are the ones he gave me on Townsend Street.

(Testimony of James Cernusco.)

When we stopped on Townsend Street that was the first time they were in my possession.

Invoice 10143 was marked U. S. Exhibit 32 for identification, and invoice 10144 was marked U. S. Exhibit 33 for identification. The next day I went to Livermore and gave Government's Exhibit 32 to Mr. Vukota. The next day I gave Mr. Lewis his invoice in Livermore. I do not know Harry Blumenthal. When I stopped on Third Street the man I was with who said he was salesman for the Francisco Distributing Company had left our automobile. He just crossed the street to the left side, going up Third Street, which would be going up toward Market on the left-hand side. I didn't notice him when he came back. I didn't see him come across the street. After I had the conversation outside the warehouse on Townsend Street, I went into the warehouse. The other man and I walked together. When we entered the warehouse, I just asked him if there was some whiskey here for Mr. Vukota and Mr. Lewis. When will it be delivered? He just said, "It will be delivered in a few days". I asked the clerk there at the San Francisco Warehouse. I do not know his name—it was a woman who was there.

Cross-Examination

By Mr. Riordan:

The defendant Blumenthal, at the request of his counsel, stood up.

The Witness: I do not know this gentleman (re-

(Testimony of James Cernusco.)

ferring to the defendant Blumenthal). I never did any Old Rocking Chair business with him. [281]

JOHN E. VUKOTA

called on behalf of the Government, and being first duly sworn, testified on direct examination by Mr. Colvin:

I have a tavern business and a liquor license at 1079 First Street, Livermore, California. I was engaged in that business in December, 1943, and January, 1944. At that time, I purchased some Old Mr. Boston Rocking Chair Whiskey. Government's Exhibit No. 28, for identification, which is a check to the Francisco Distributing Company for \$2,000 is my check which I wrote myself. I gave this check to James Cernusco about the middle of December.

Government's Exhibit for identification No. 29 which is a check for \$450. to Francisco Distributing Company is my check, and that is my signature that appears thereon. I wrote that check which was the end of December, and I gave it to James Cernusco. At the time I gave Mr. Cernusco the check for \$450 I gave him \$3,050 in cash. After that time I received a shipment of Old Mr. Boston Rocking Chair Whiskey. Government's Exhibit for identification No. 32 is an invoice to me which I received from Mr. James Cernusco about the first week in January. The whiskey arrived about

(Testimony of John E. Vukota.)

a day or so after I got that invoice, about the first week in January of 1944. One hundred cases of Old Mr. Boston Rocking Chair Whiskey arrived. Those were fifths. In response to a question by Mr. Friedman, the Court stated that the testimony of this witness was limited as was the testimony of Cermusco, because it pertained to the same thing.

V. M. LEWIS

called as a witness on behalf of the Government, and having been first duly sworn, testified: [282]

I run a restaurant and a tavern named "Mally's Grill" located at 1141 First Street, Livermore, and I was occupied in that business during the months of December, 1943, and January, 1944. I purchased 100 cases in fifths of Old Mr. Boston Rocking Chair Whiskey during that time.

Government's for identification No. 31, a check for Francisco Distributing Company for \$2,000 is my check, and that is my signature which appears thereon. I wrote that check December 14, 1943 and gave it to James Cermusco just after it was written.

Government's for identification No. 30, which is a check to Francisco Distributing Company for \$450 is my check, and that is my signature which appears thereon, and I gave it after I wrote it to James Cermusco, approximately December 30, 1943. At the time I gave Mr. Cermusco that check, I gave him \$3,050 in cash. Subsequent to that time,

(Testimony of V. M. Lewis.)

I received a shipment of Old Mr. Boston Rocking Chair Whiskey. It arrived in the early part of January. There were 100 cases, and those were cases of fifths. I received the invoice marked Government's for identification No. 33 the early part of January. I don't know the exact date but it was a date before the time the whiskey arrived.

In response to a question by Mr. Friedman, the Court stated the testimony of the witness was limited in like manner as was the testimony of the Witness Cernusco.

NORMAN REINBURG

Recalled, testified:

The check with the stub stapled thereto entitled "90-154" made out to the Francisco Distributing Company for [283] \$2,450 is my check, and that is my signature which appears thereon. I gave that check after I wrote it to Mr. Abel. That check was made out at Mr. Abel's direction.

The check was marked U. S. Exhibit 34 for identification.

This check, dated December 24, 1943, to the Francisco Distributing Company for \$2,450 with a stub attached thereto is my check, and the signature that appears thereon is mine. I gave that check, upon making it out, to Mr. Abel, at Mr. Abel's direction.

In response to questions by counsel, the Court stated that the documents were received in evi-

(Testimony of Norman Reinburg.)

dence as against the defendant Abel, and the same were marked U. S. Exhibits 34 and 35 in evidence, and were later re-marked Defendant Abel's Exhibits A and B.

(The Witness Continuing):

These two identified documents 34 and 35 came back to me in the regular course of business. The stubs are also part of the records of my business and were made out at the same time that the checks were made out in each instance.

Counsel for the defendant Abel called attention to the fact that on the back of each of the checks was the following: "Pay to the Order of the Bank of America", and stamped "Francisco Distributing Company 122-Tenth Street, San Francisco".

Cross Examination

By Mr. Wolff:

When I say that I made out that check at the direction of Mr. Abel, I mean that I made it out in payment for the whiskey I was purchasing. Mr. Abel did not give me any personal directions how to write it or what to do about it. [284] He said "Francisco Distributing Company, \$2,450", and I did. He told me that was where I was getting the whiskey. I know a man by the name of Bob Davis and a man by the name of Louis Diamond. I acquired the place of business which I called "Dopey Norman's" in 1939. I have lived in Vallejo since 1919. I have known Bob Davis and Louis Diamond a good many years, Bob Davis I would

(Testimony of Norman Reinburg.)

say, six or seven years. I don't know Mr. Diamond very well. He is a customer. He comes in my place. He has a drink once in a while. His personal problems I don't know anything about. I know neither of them personally. They are good business friends. I would say I have known Mr. Diamond two and a half years. Bob Davis is just a nice old man, a pretty nice old fellow, treats everybody nice, everybody likes him, including myself. He has been in business a good many years. He has a pawn shop and jewelry shop. I guess Louis Diamond is one of his employees. He is in the store at all times. Louis Abel worked there for a while. It seems to me Mr. Abel had been in Vallejo prior to the time I met him and discussed this subject-matter with him about two or three months. During that period of time, he was working for Bob Davis. Whether he is working there or not—he is in and out of the place quite often. He was behind the counter on several occasions. Subsequently, Louis Abel opened up his own place of business. His pawn shop was built there in my building and he moved into the pawn shop on February 15, 1944. He leased a place for five years in my building, and he and I became very friendly. His problems and Mr. Davis' never entered in my business, and I don't know how long he had known Mr. Davis, or anybody else. He opened up a pawn shop and jewelry store. We were pretty good friends. I don't know what you would call "pretty good friends". We were business friends by a sale.

(Testimony of Norman Reinburg.)

A man comes in my place and out, and so forth. He is [285] around the street all the time. I testified yesterday that, in addition to this check, I gave him some cash, I guess twenty dollar bills. Some fifties were in there. It all amounted to enough to pay the bill, and the total amount of the cash was \$4,050 in each case, and in each case there were only bills, no gold, no silver. The largest denomination was \$50. I gave the money to him at 124 Georgia Street. That is my home. I live there, that is my place of business. It is my home when the doors are closed, and it is a saloon when the doors are open. I occasionally meet Mr. Davis and Mr. Diamond on the street and say "Hello", or if they are in the restaurant, I talk to them if they happen to be sitting next to me. I never went to Mr. Davis' place of business unless I had to buy something. At the time I was in Mr. Davis' place of business, I bought a ring from him. I have been in there several times. I don't know whether Mr. Davis was in business in Vallejo before I came there. I came to Vallejo for the first time in 1919. I don't know where Bob Davis was then. The first I knew him was six or seven years ago. I gave this cash in the denominations I have indicated to Mr. Abel at my place of business or home about December 13, or 14, 1943. It was in the early part of December, and I gave the money on the first occasion. I never gave Mr. Abel any other money or check of any sort or character other than the two checks now in evidence of \$2,450 a piece.

(Testimony of Norman Reinburg.)

and this \$4,050 cash in the denominations of fifty and twenty dollar bills. That is all I ever gave him for the purpose of acquiring for me this liquor that I have mentioned. I did not give both checks and cash at the same time. There was 25 days difference there. The first time I gave a check for \$2,450 to Mr. Abel was around the first part of December, 1943. I didn't give him any cash the first time, and gave the man a check. The first time I gave him [286] \$2,450 in a check about December 13, 1943. At that time I did not give him any cash. I gave him a check for \$2,450 around December 26th or 27th, 1943, the second time at my place of business. It was not at that second time that I gave him the cash. I never gave him the cash only on two occasions. I have already mentioned. I gave him the cash when I received the bill showing the whiskey was slated to be sent to my address. The whiskey was delivered to me by some of the draying companies.

Exhibits 22 and 23 for identification refresh my memory as to when I gave the cash to Mr. Abel when he gave me this. I gave him the cash in each instance, which was the middle of December; the other was in January. I gave Mr. Abel one check for \$2,450 about the 13th of December, 1943, and I gave the second check for \$2,450 to Mr. Abel about the 26th day of December, 1943. I should say I got the first load of whiskey in time for Christmas, and I got the second load of whiskey on after New Year's, and after the man got the

(Testimony of Norman Reinburg.)

cash, the whiskey was delivered about four days later in each case. The first came about December 25th, approximately. It came in time for the Christmas Holidays. When I got the first 100 cases of whiskey, I gave Mr. Abel the \$4,050.

The second delivery of whiskey was made right after New Year's January 3d or 4th, along in there. I gave him cash when he gave me the bill—right after New Year's. The cash I say I gave him in denominations of bills of \$50 and \$20 was given to him, \$4,050, on or about January 4, 1944. Prior to that time I had not given him any cash of any kind. I gave him cash twice. I got two hundred cases of whiskey, there were a hundred cases about 25 days apart. I gave him cash the first time when he gave me the bill. I gave him the [287] first check about December 13, 1943, and I gave him cash the first time about December 17, 1943. I gave him \$4,050. The same thing repeated itself after New Year's. I gave him \$4,050 about January 4. The bills that I used in my business is what he got. I reached in the safe and got them. I never at any time gave any cash or made any payment in any form for any of this whiskey to Bob Davis, or to Fred Diamond. I have never given them any payment of any kind for anything.

Redirect Examination

By Mr. Colvin:

I was anxious to have whiskey, and there must less three was an invoice. I wouldn't expect any whiskey unless there was an invoice. I wanted to

(Testimony of Norman Reinburg.)

be sure I was dealing with a legitimate house, a legitimate distributor. You can buy whiskey off a truck on the street or anything like that. I wanted to buy the whiskey through a legitimate place of business.

HENRY L. TAYLOR

Called as a witness by the Government, and being duly sworn, testified as follows:

Direct Examination

By Mr. Colvin:

I am in the contracting business in Shasta County, and I also have "Ponty's" pool place, with Mr. Humes. I operated that Ponty's Place during December 1943 and January 1944. I was operating that as a liquor establishment, there is a bar there for which I hold the license, and that license was issued to both Mr. Humes and myself. During the month of December 1944 I made a purchase of Old Mr. Boston Rocking Chair Whiskey [288] from Mr. Feigenbaum. I see Mr. Feigenbaum here in the courtroom—the gentleman with the dark suit with his hand against his face.

(Thereupon, at the request of the court, the defendant Feigenbaum stood up.)

The Witness: (Continuing) That is the gentleman I am referring to. I bought this whiskey from

(Testimony of Henry L. Taylor.)

Mr. Feigenbaum in the early part of December in a drug store on Mission Street.

The Court stated that the record would show that this evidence was being offered only as to the defendant Feigenbaum.

The Witness: (Continuing) I had a conversation with Mr. Feigenbaum. That conversation took place at the drugstore which I have mentioned. Beside Mr. Feigenbaum and myself, my wife and Mr. Humes were present, and there were two other parties there.

Q. What was that conversation, regarding the purchase of whiskey?

Mr. Friedman: We object to that on the ground it is incompetent, irrelevant, and immaterial, the corpus delicti of the charge in this indictment has not been laid, and until the corpus delicti is established any acts, declarations or statements of a defendant or alleged co-conspirator are inadmissible.

The Court: I will overrule the objection. He is asking for a conversation as to the purchase of the liquor.

Mr. Friedman: Exception.

The Witness: (Continuing) I don't recall what Mr. Feigenbaum said. I do not recall the exact words.

(To the Court): I bought some whiskey from this man. We went out there to buy this whiskey, and he told us how much it was. We gave him a \$500 deposit prior to that, [289] and he said if we

(Testimony of Henry L. Taylor.)

hadn't shown up, why, we would have lost that \$500. We went out into this man's place of business, and I had a talk with him. He said he would give us the whiskey. He did not tell me what kind of whiskey at that time. He told me the price would be \$64.00. We said we would take it. He wanted us to take 200 cases. So we finally thought we would take 200 cases. So we took 100 cases instead of the 200. At the beginning of the conversation, I told Mr. Feigenbaum we would take 100 cases. He wanted us to take 200 cases. I told him we would if we could afford it. We finally made a deal for the 100 cases. He had us to make out a check to the Francisco Distributing Co. for \$4900. That conversation took place on December 9 at the Sunset Drug Store on Mission Street, San Francisco, around 21st Street. A gentleman by the name of "Little Joe," and another fellow by the name of Tucker, were present beside Mr. Feigenbaum, Mr. Humes, and myself. We were introduced to Mr. Feigenbaum, and he said it was lucky we came down, or we would have forfeited the 500. We said we were anxious to come down and save our \$500, and we was anxious to get the whiskey. We told him we were from Cottonwood, Shasta County. Mr. Humes and myself were introduced to Mr. Feigenbaum by this man "Little Joe." He said he would get us the whiskey and the price was \$64, and he had us make a check to the Francisco Distributing Company. That was per case for 100 cases. We told him we would take 200 if we could.

(Testimony of Henry L. Taylor.)

If I couldn't, why he would take the 100; he would keep the other 100. He wanted to bill 200 cases against our license. He said he could take the other 100 if we didn't take it. He said he would run it in on our license. He had me make him out a check; that is, I had to go out and get my wife at the car, and she came in and made the check to Mr. Feigenbaum. I had left her at the car outside. Mr. Feigenbaum instructed my wife how to make the check out. [290] The check shown me, entitled, "R. M. and H. L. Taylor, Pay to the order of Francisco Distributing Company, \$4900," is the check my wife made out at that time. It was written and signed by Mrs. Ruth Taylor in my presence. He instructed her to make it to the Francisco Distributing Company for \$4900.

The said check was marked for identification as U. S. Exhibit 34.

The Witness: (Continuing) She made the check out for \$4900, and he had us give him \$1,050 in cash. I gave the money to Mr. Feigenbaum. We discussed the 200 cases and finally we took the 100 cases. It was finally said if we did not take the 200 cases he would take the other 100 cases. I do not think anything else was said at that time and place in that conversation. On the 1st of December I gave \$500 to Little Joe. It was on some street the other side of town. We met him at some bar over there. It was beyond Market Street, over around Turk or somewhere over in there. I had a conversation with the man to whom I gave the check,

(Testimony of Henry L. Taylor.)

which took place on the street in front of this bar. Beside myself and Little Joe, Mr. Humes and this man Tucker were present.

Q. What was the conversation?

Counsel for the defendant Feigenbaum objected upon the ground that the conversation was not binding on the defendant Feigenbaum because it was a conversation occurring out of his presence.

The Court overruled the objection, to which ruling counsel for the defendant Feigenbaum then and there duly excepted.

The Witness: In that conversation Little Joe said he [291] could get us some whiskey, and we said we would take it. We said we would give him a deposit of \$500 and he would make a deal, getting us the whiskey. At that time he did not tell us what kind of whiskey it was. There was 100 cases mentioned at the time. We gave him the \$500 on the street, and he agreed to get this whiskey in about a week's time. That was all of the conversation at that time and place. After that conversation Mr. Humes and I went back to Shasta County—Cottonwood. Mrs. Taylor had not been down with me at that time.

I next came to San Francisco on the 9th and 10th of December, when we met Mr. Feigenbaum. My wife and Mr. Humes were with me. I located Little Joe at that time; we met him at the bar on the street. I believe it was "Little Joe's Place," if I am not mistaken. I went to the Sunset Drug Company and held a conversation with Mr. Feigen-

(Testimony of Henry L. Taylor.)

baum, the same day that I met Little Joe on my return from Cottonwood. I imagine it was around about mid-day, about noon time. When I met Little Joe, Mr. Humes and myself and Mrs. Taylor and the man Tucker were present. Then all of us proceeded to the Sunset Drug Company; that is my testimony. After the conversation on the 9th of December at the Sunset Drug Company we went back to Shasta County. I next returned to San Francisco on December 23, on my way to Los Angeles with my wife. I visited the Sunset Drug Company. I had a conversation with Mr. Feigenbaum on that day at the Sunset Drug Company. My wife was not with me during that conversation. Only Mr. Feigenbaum and myself were present.

Q. What conversation did you have with Mr. Feigenbaum on that date regarding the whiskey?

Mr. Friedman: I will object to that on the ground it is incompetent, irrelevant and immaterial; the proper foundation is not laid. We have no proof of the corpus delicti, or [292] fact, and act, statement or declaration of an alleged co-conspirator—

The Court: "Objection Overruled, Exception Noted."

The Witness (continuing): I had a conversation with him. I asked him, "Where is our whiskey?" We were worried about it. We hadn't heard anything from this liquor. So he told us it would be in soon, and it would be shipped to us. At that

(Testimony of Henry L. Taylor.)

time he told me the name of the whiskey was the Old Rocking Chair, and he showed me a bottle he had in his desk drawer. That was a fifth. I did not open the bottle there. I asked him what kind of whiskey it was, and how good it was, and I made a deal with him then to buy a case of whiskey to take down to Los Angeles with me. That was in addition to the other purchases. I paid him \$64 for that case in cash. I told him I would take the 100 cases, and he wrote a check out to me, H. L. Taylor, and I endorsed it back to him. He wrote a check to me for \$2450. He asked me to endorse that so that would put him in the clear.

(To the Court): That would give us, instead of taking 200 cases, which we were billed for, the \$4900. That would give us just the 100 cases for \$64 a case, so he wrote the check for \$2450, and had me endorse it back to him. He signed that check in my presence. I did not receive any cash for it when I endorsed it. I told him I had to be going, I was going to Los Angeles, and we wanted to get our whiskey as quick as we could. We gave him instructions previous to that. I had no subsequent dealings with him.

Cross Examination

By Mr. Friedman:

I saw Mr. Feigenbaum twice. I first came to San Francisco [293] as far as this transaction is concerned on December first. I and my wife and my

(Testimony of Henry L. Taylor.)

partner came down. That is not right. On the first trip Mr. Humes and I came. The first trip I came down here to get some whiskey. I saw a man by the name of Little Joe on that occasion. I never saw him before. I also met a man named Tucker. I had not known the man named Tucker before. I had a conversation with Little Joe, and Mr. Tucker. I met them together in Little Joe's bar or saloon. We were looking for whiskey, and he said he could get some whiskey. I said to him I was looking for some whiskey; he would see if he could get us some whiskey. I asked Little Joe or Mr. Tucker to see if they could get me some whiskey. They said they could get us some whiskey. I did not ask them where. They wouldn't tell us. I said to them I wanted to know where it was at. They wouldn't tell us where it was at. They simply said they would get me some whiskey. I told them we would take 100 cases. They asked how many we would take. We told them we would take 100 cases. They mentioned the price. They said it would cost Mr. Humes and I \$64. I asked them what kind of whiskey it was. They did not tell us what the name was, but it would be 80.6 proof. That is what they told us. They did not tell me whether it would be straight or blend. I did not ask. I have not been in the saloon business very long. We bought the place August 17, a year ago, —a year ago last August. I had only been in this particular kind of business two or three months. Mr. Humes had been in the business more than

(Testimony of Henry L. Taylor.)

that; about 6 months, I imagine. Neither Mr. Humes nor I knew very much about it. They wanted us to give them the money and to make a deposit on it, and they asked us for \$500, and I gave them \$500. [294]

That is what they got the \$500 for. They did not tell me they wanted \$500 in order to get some whiskey for me. They said they had to have a deposit on it. They said they had to make a deposit on it, and I was to give them \$500. I asked them if I was going to get the \$500 back if I did not get the whiskey; they said if we didn't make the deal, we would get the \$500 back. They told me if they couldn't make the deal for me, I would get my \$500 back. I paid for this in cash, five one hundred dollar bills. I did not have any other talk with them on that day. We just talked about the whiskey, then I went back to Shasta County. I came back the 9th of December. Mr. Tucker and Little Joe told us to come back in a week or ten days, and I came back. I found Little Joe and Mr. Tucker together again. I imagine it was in Little Joe's place. I won't say whether it was his place or not, but I think it was. That is the time when they took us to the drugstore on Mission Street, and that is the first occasion on which I met Mr. Feigenbaum. When I arrived at the drugstore, my partner, Tucker, Little Joe and I went into the drugstore. My wife remained in the car. When we first came into the drugstore and saw Mr. Feigenbaum, Little Joe introduced us to Mr. Feigenbaum.

(Testimony of Henry L. Taylor.)

He said we was the ones that had the \$500 for that whiskey. Little Joe said "These are the people who put up the \$500 for the whiskey". He said it was a good thing we got in there, or we would have lost our deposit. I told them I couldn't afford to lose \$500. We did discuss our understanding that I would get the \$500 back if I did not get the whiskey. I believe both Mr. Humes and I made that statement. Mr. Feigenbaum said we would get the \$500 back if we didn't get the whiskey. Then he instructed us to get the whiskey, and for us to make out our check, so I walked out, brought back my wife, and he instructed her how to make [295] out the check. There was no discussion about how much whiskey we were going to get, how much it was going to cost us, until after the check was made out. He wanted us to take 200 cases. He said he could get us 200 cases. He did not say he had 200 cases he would sell us. He did not say that. I did not ask him where he was going to get the whiskey from at any time because it was not supposed to be shipped in yet. It hadn't been unloaded from the car yet. We asked him where it was coming from, but he didn't tell us. He wouldn't tell us what the brand was. I wouldn't recall that I asked him. He said "Take 200 cases", and he wanted our license number. We brought him our license number down so we could have the cases charged to our license. In my operations under a California Liquor License or Federal Liquor License, I have to keep track of how much

(Testimony of Henry L. Taylor.)

whiskey I buy. He told me he would like to have those 200 cases registered or recorded under our license. We told him we would take the 100 cases. This was the first time I saw him. I said I would take 100 cases. Then he told me to make out a check, that is when I went out to get Mrs. Taylor. He instructed Mrs. Taylor to make the check out for \$4,900, and there was something said in that conversation about the fact that we might take 200 cases. We said we might take 200 cases if we could handle it, and if we did not take the 200 cases, why he would take the 100 cases himself. Mr. Feigenbaum mentioned the amount that this check was to be made out in. He said to make the check out for \$4,900. He did not ask why it should be made out for \$4,900. I did not ask why it should not be made out for \$6,400.

Q. Did you ask why it should not be made out for \$5,900?

A. That wasn't mentioned, no \$5,900. I had already paid \$500 according to my understanding. That was to cost [296] us \$6,400 altogether. That was understood in the first beginning.

Q. So there was nothing said as to why you should make out the check to the San Francisco Distributing Company for \$4,900?

A. That was the distributor he was dealing with. Then Mrs. Taylor made out the check, and we went back to Shasta County, leaving the check and \$1,050. He told us to pay him \$1,050 in cash, of which he had \$500. He didn't tell me why I should

(Testimony of Henry L. Taylor.)

pay that in cash. We never asked him why. We never asked him "Why can't I or Mrs. Taylor make out the check for the whole business?" I didn't get a receipt for the \$1,050. My wife asked for a receipt for the check, for the \$4,900. I did not get one. My wife did not get one. He told her the check would be a receipt. Nobody, my wife, nor my partner, nor I asked for a receipt for the \$1,050. I received nothing to show that I paid \$1,050 in cash. I asked when I was going to get the whiskey. He told us in a few days it would be unloaded. We wanted to get it right away, and we would haul it ourselves. He said it would be shipped by truck or freight, and charged us \$50 for shipping. We gave him \$50. That accounts for the odd \$50 for the cash that was paid. I came back again on the 23rd. On that trip I did not get to see Little Joe or Mr. Tucker; I went right to Mr. Feigenbaum. My wife and I were on our way to Los Angeles. I had not received any whiskey as yet. So I went to see Mr. Feigenbaum. It was in the evening in the drugstore. His clerks were in there, but he and I talked this by ourselves. My wife did not come in. I wanted to know where the whiskey was and when we were going to get it. He said it would be unloaded in a few days; we would be getting it in a few days. He asked me to write the check out, sign it and endorse it to him. [297] I told him I couldn't take the 200 cases. I could only take the 100 cases. Mr. Feigenbaum said all right, he wanted me to

(Testimony of Henry L. Taylor.)

take the 200 cases. He still wanted me to have the 200 cases and I refused. Then Mr. Feigenbaum wrote out a check to me, and told me to sign it. He wanted me to sign the check so he could have the check back again. He didn't tell me the exact why. That was for the other 100 cases that we made the deposit on. He was supposed to run that back to us which I endorsed the check and gave it back to him. The check for \$4,900 which I gave was a deposit on the 200 cases at first if we could take them. The \$4,900 was a deposit or an order for the Francisco Distributing Company for 200 cases of whiskey. On the second visit at the drug-store on the 23rd, he told me he was going to take the other 100 cases if we didn't take them, and I said I was not going to take it. He wrote me out a check which I made the deposit and he gave me that check to sign back to him. I couldn't say that he told me that, as I had already put up a deposit for the 200 cases. He wanted his records to show that I put up a deposit for half of that. He did not tell me that to my knowledge I was signing this check to clear him so he could get his money which we were paying him, \$6,400 for the cases of whiskey, or the \$6,400 for the 100 cases of whiskey. By "clear him to get his money", I mean it wasn't to clear his money, it was to clear his records. I had already put up \$6,950. That paid for my 100 cases of whiskey. If we had taken the other 100 cases which he wanted us to take, it would have cost us more, but we didn't want

(Testimony of Henry L. Taylor.)

the other 100 cases; it was too much money. It would cost us another \$6,400. He wanted me to sign the check, and he wrote the check out, and I signed the check for him. What his purpose was, I don't know what he wanted to do with the check. I simply endorsed the check [298] showing I had received \$2,450 for no reason that I know of. After I endorsed this check, he showed me a bottle of whiskey, and I bought another case of whiskey from him and went to Los Angeles. That is the first time I heard the brand mentioned. He showed me the bottle. I am not very much a drinking man. I drink some. I asked what kind of whiskey it was. I asked him if it was any good. I did not ask him to be given a drink of it to find out whether it was or not. He did not offer me any, but he showed me a bottle, and then I asked if I could have a case to take with me to Los Angeles. He had a case there, and had his man put a case in my car, and I paid him \$64 in cash. Then, my wife and I drove away. I did not see Mr. Feigenbaum again. I eventually got my 100 cases of whiskey. That is my signature on the reverse side of the paper now shown me.

The document was marked Defendant Feigenbaum's Exhibit "A" for identification.

(The Witness continuing):

At first we agreed to take 200 cases of whiskey. We dealt on 200 cases. It was on the 23rd that I changed that original agreement.

In response to questions by counsel, the Court stated that the testimony of the next witness would be received against the defendant Feigenbaum.

RUTH TAYLOR

called as a witness on behalf of the Government, having been first duly sworn, testified as follows:

My home is in Cottonwood, California. I am a housewife, and my husband is Mr. Taylor, the witness who just [299] testified. I have seen this check to Francisco Distributing Company for \$4,900 now shown me. That is my check, and that is my signature that appears thereon. I wrote that check myself on December 9, 1943 in the Sunset Drugstore in the rear of the drugstore. At that time, my husband, Mr. Humes and Mr. Feigenbaum, and a man named Mr. Tucker, and another fellow they call Little Joe were present. I wrote that check at Mr. Feigenbaum's instructions. He told me to whom to make the check payable. He told me the amount for which I was to write the check. I did not witness the payment in cash of any money to Mr. Feigenbaum on that occasion. I had given my husband the money, but didn't see him present it to Mr. Feigenbaum. At that time, I had given my husband a certain amount of cash after he had parked in front of the drugstore. (here) \$1,000 in hundred dollar and fifty dollar bills. I happened to have the cash with me, and

(Testimony of Ruth Taylor.)

I gave it to him. There was a discussion about writing the check.

Q. What was that discussion?

Mr. Friedman objected to the question on the ground that it was immaterial and irrelevant as against the defendant Feigenbaum, and that it called for acts, declarations and transactions participated in and performed by defendant Feigenbaum when the substance of the offense charged had not yet been established.

The Court overruled the objection, to which counsel for the defendant Feigenbaum duly Excepted.

(The Witness continuing):

Mr. Feigenbaum told me to make it out to the Francisco Distributing Company for \$4,900. I asked if we would get a receipt for it, and he said the check would answer as a receipt. I did not have any other discussion. I didn't [300] hear any of the transactions of the persons present except I wrote out a check for that amount of money and asked for a receipt, and he said the check would act as a receipt. I left after I wrote the check and went back to the car, and Mr. Taylor came back for the money after I got back to the car. It was after I returned to the car and after I had written the check that Mr. Taylor came out. It was at that time I gave him the cash, and he returned to the Sunset Drugstore. I never witnessed the arrival of any Old Mr. Boston Rocking Chair to the Cottonwood Ponty's.

RAYMOND C. HUMES

called as a witness by the Government, having been first duly sworn, testified as follows:

My home is in Cottonwood, where I have lived about six years. I have a saloon there, with Mr. Taylor. The name of the saloon is Ponty's Place. I operate it as a partnership with Mr. Taylor. I have a retail license there. I was in that business during the month of December, 1943. During that month, I made a trip to San Francisco around the first of December. I traveled to San Francisco with Mr. Taylor to see if we could get some whiskey. We went out to Hart's first, out to the distributor there, but we couldn't get any there, so we came back to a saloon over here on Larkin Street. We were in there having a drink, talking about it and ran into a fellow named Tucker, and he got talking to us about this whiskey. Mr. Taylor was with me at that time. Then Mr. Tucker took us down to see another fellow by the name of Little Joe. Mr. Taylor went with us. I am sure there was another fellow present, but I wouldn't know his name. I am not very familiar with the streets but it was on the other side of Market Street from this post office building that we had the discussion. Mr. Tucker took us down to see Little Joe [301] and we asked him about the whiskey, whether we could get any whiskey, and he said he thought we could. We told him what we was down here for was whiskey. He said he thought he could get us some, but we would have to put up a deposit,

(Testimony of Raymond C. Humes.)

he said \$500 in order to. He asked us how much, and we said we could handle 100 cases. He did not tell us what kind of whiskey he could get for us. He wanted to know where we could get that whiskey, or where he was going to take us to, and he said we would have to leave that up to him. He said it would cost around \$64. That was about all that was said. Mr. Taylor gave Little Joe \$500. He said that if we didn't get the whiskey, we could get our \$500 back again. He said, "You come back in a week", and then he thought he could fix us up. I think that was all the discussion with Little Joe then or with Mr. Tucker. Subsequent to that conversation, we returned to Cottonwood. Mr. Taylor went back with us. He accompanied us, so after that, Mr. Taylor, his wife, and I traveled back to San Francisco. We found Little Joe and Tucker on that occasion. We found Mr. Tucker first. He took us down to Little Joe. I had a discussion then at Little Joe's. That was around the 8th or 9th of the month. Later on that date, we went to the Sunset Drug Store. Little Joe introduced us to Mr. Feigenbaum. I see Mr. Feigenbaum here in the court room. (Here the witness pointed out the defendant Feigenbaum.) Mrs. Taylor was in the car with us. She did not go into the drugstore with us. Little Joe took Mr. Taylor and myself in and Tucker went in, too. We had a conversation with Feigenbaum at that time. The four persons that I have named who went into the drugstore and Mr. Feigenbaum were the par-

(Testimony of Raymond C. Humes.)

ticipants in that conversation. There was a clerk in there. He seemed to be busy. There were two or three people in there working back and forth. They were [302] in the forepart of the drugstore.

Q. What was that conversation you had with Mr. Feigenbaum?

Mr. Friedman objected to the question upon the ground that it called for the act or declaration of payment on the part of an alleged co-conspirator in the case, and that there had been no proof of the corpus delicti.

The court overruled the said objection, to which counsel for the defendant Feigenbaum duly Excepted.

(The Witness continuing):

We were introduced to Mr. Feigenbaum by Little Joe and Mr. Feigenbaum wanted to know what we would have, and we told him we wanted 100 cases of whiskey. He said, "Yes, I think I can get it for you". Nothing was said about the deposit right at that time. He said he would get us 100 cases of whiskey, and he would have to have a check for it for \$24.50 a case. He told us that the whiskey would cost us altogether \$64 per case. It was then that I had the discussion about the \$500 I had paid. He said it was a good thing we got down on that date or we would have forfeited the \$500. Mr. Feigenbaum said that. We had a conversation then about the number of cases we were going to take. We were talking about 100 and Feigenbaum wanted to know if we couldn't take 200. I thought

(Testimony of Raymond C. Humes.)

it was a little too steep for myself and I said that. Then, Mr. Taylor and him and I got talking about how we could use the 200 so we were to make out the check for 200 cases, which was \$4,900. The check for \$4,900 was made out after our statement that maybe, we could take 200. We asked him about the whiskey, if we could take the whiskey up on a truck with us to Cottonwood. He said the whiskey wasn't in. He said it [303] would be about a week or ten days, that the whiskey would come in on a car, and that they would send it up by truck. If not, we would receive it by freight. We asked him where the distributor was, and he didn't say. He asked fifty cents a case to pay for the freight. He was paid an amount of money for the freight in addition to the \$500 deposit and the check for \$4,900. He was paid the further amount of \$1,050. Mr. Taylor paid that money to Mr. Feigenbaum in my presence. Mr. Feigenbaum then said he wanted a check for \$24.50. He said that went to the distributor. He said we would have to come through with \$1,050 in cash. I think that is about all the discussion at that time. I have seen the invoice of the San Francisco Distributing Company No. 10091. It came by mail in Cottonwood. That has been kept as part of my records in the operation of my business. Those records are kept by myself. I received 100 cases of Old Mr. Boston Rocking Chair Whiskey by freight. Those were cases of fifths. I unpacked them my-

(Testimony of Raymond C. Humes.)

self. I checked the number. The number was 100 cases.

Thereupon, the invoice referred to was marked U. S. Exhibit 35 for identification.

(The Witness continuing):

In my first conversation on or about the first day of December, Little Joe said we would have to have the cash and to bring it in hundred dollar bills. He told me that I would be expected to write a check in addition to the cash. He did not give me any explanation of that. I checked the proof on that whiskey when it came in. It was 80.6 whiskey. I never had any subsequent dealings with Mr. Feigenbaum with respect to the shipment of whiskey. [304]

Cross Examination

By Mr. Friedman:

After December 8th or 9th, we were probably here in San Francisco a couple or three days. I am sure that was my last trip to San Francisco. I went one time into Mr. Feigenbaum's Drugstore. I am almost positive it was just one time. I don't think Mr. Taylor and I went into Mr. Feigenbaum's drugstore after December 9th. It is not a fact that the talk about freight occurred at a later date than the check for \$4,900 was given. My recollection is this all happened at the same time. I don't just remember how this question of fifty cents a case freight came up. It came up

(Testimony of Raymond C. Humes.)

when Mr. Taylor and I suggested that we could take the stuff up to Shasta County ourselves. We were told at that time that the goods were not available for us to take, and that when they were available they would be sent up by truck, or by freight. That is the time that the cost of that came up, the cost of the freight, fifty cents per case. Mr. Feigenbaum said that. On December 9th, after some discussion and reluctance on our part, Mr. Taylor and I agreed to take 200 cases. On the 9th of December we changed that determination. We got to talking it over. We thought we could only handle 100 cases. I told that to Mr. Feigenbaum after the check was written. We wrote the check in anticipation of taking 200 cases. We changed this determination, I think, before the cash had been passed. I am almost positive that the cash was paid on December 9th. I am sure that the cash was passed the same day that the check for \$4,900 was written. Mr. Taylor went out and got the money for Mrs. Taylor. I am sure it was on that day. When I came to this place with Little Joe and Mr. Tucker, that was the first time I ever met Mr. Feigenbaum. That is the last time I ever saw him. On being introduced to him, I don't remember what was the first thing that was said [305] and who said it. Someone must have mentioned the fact that I wanted some whiskey. I could have said it was Mr. Taylor. One or the other said we would like to get some whiskey. Somebody said that Mr. Taylor and I were in the

(Testimony of Raymond C. Humes.)

liquor business. Mr. Feigenbaum said he could get us the whiskey. He asked us how much we wanted. We said 100 cases. Nothing was said about what kind of whiskey, Scotch, or Rye, or Bourbon, or as to the classification or the brand. We did ask him if it was good whiskey. That is all that we were concerned with. Mr. Feigenbaum said it was. Mr. Taylor and I and Mr. Tucker came into Mr. Feigenbaum's drug store. Mr. Tucker introduced us to Mr. Feigenbaum. I can't remember what was said in the introduction. We did not care whether we met Mr. Feigenbaum or not; we were interested in getting some whiskey; that was the thought uppermost in my mind, and Feigenbaum said he could get us some. I do not recollect that Mr. Feigenbaum at that time said "We have some whiskey coming that I can sell you, or let you have". I would say that he did not say it. He said the whiskey wasn't available right then, that it would be in a few days, and a carload of it. Neither Mr. Taylor nor I said "Well, we have already made the deal, we put up a \$500 deposit". I could have said it or Mr. Taylor. It was one or the other. It was said when we had put up a \$500 deposit on the whiskey. When I was introduced to Mr. Feigenbaum, I said to him "We would like to get some whiskey". Little Joe brought up the subject of \$500. We had already put up the \$500, and we were going to get the whiskey. Mr. Feigenbaum was going to get the whiskey for us. Right in this conversation, Little Joe spoke up and said

(Testimony of Raymond C. Humes.)

"These people have already put up the \$500 deposit". He could have said "These are the people who put up the \$500 deposit". I guess the deal had already been made. We came [306] down there to get the \$500 or the whiskey. We came down to see Little Joe or get the \$500 or the whiskey. After we saw Little Joe, he said "I will take you over to Feigenbaum, or some place". So we went along with him. It was not the first thing said in the conversation about the whiskey. It did not come up until some time after Feigenbaum and Taylor and I were talking about the whiskey. Then, something was said about the fact that it was lucky we came in, or we had lost our deposit. Mr. Feigenbaum said it was a good thing we got down on that date, or we would have forfeited the \$500. In response to that, Mr. Taylor or I said we were glad we got there. We did not have any arrangement with Little Joe or Mr. Tucker for paying them anything for getting the whiskey that I know of. I heard they was to get something but I couldn't say what. Mr. Taylor did not tell me that. I did know somewhere along the line that for their assistance in getting us some whiskey Tucker and Little Joe were to be compensated. I did not know that Mr. Tucker and Little Joe were to keep the \$500 that we gave him in order to find somebody that would give Mr. Taylor some good whiskey. I don't remember that when we had our first conversation with Mr. Tucker and Little Joe they said that they could find somebody who would sell us some

(Testimony of Raymond C. Humes.)

whiskey, but it was going to cost Taylor and myself \$500 for them to do so. I would say it did not happen. My understanding was that \$500 was to go as part of the purchase price of the whiskey and not as a commission or bonus to Little Joe or Tucker. Mr. Taylor or I asked Mr. Feigenbaum who was the distributor going to be. He did not tell us. I think he said he couldn't tell us. I don't remember that Mr. Feigenbaum said something to the effect, "Well, that is a secret", "it is no concern of yours as long as I get you the whiskey; that is all you are concerned with". I do not recall anything like that being [307] said. I do recall that he said he couldn't tell us the distributing house or the warehouse. In other words, he told us to make out the check to the Francisco Distributing Company. That was just while we were in there. We were there fifteen or twenty minutes. The whole business took not much more than fifteen or twenty minutes. When he gave directions as to the making out of a check, we knew the distributing company. The talk about the check before Mrs. Taylor was brought from the car was that we would have to have a check for \$4,900. We were told that the check was for whiskey. We were not told anything else about that. Mr. Feigenbaum gave an explanation that it was for the distributor. He didn't say anything else about the distributor, as to how much more they were to get. It is a fact that the check for \$4,900 was to be made out because that was the money the dis-

(Testimony of Raymond C. Humes.)

tributing company was to get for the whiskey, and that the \$4,900 was what the distributing company was to get for 200 cases of whiskey. Then he said we would have to bring in the cash for the balance of it. He said to us, "The balance of it will have to be paid in cash to me". In that conversation, Mr. Feigenbaum told us that for the 200 cases we would have to make out a check for \$4,900, which was what the distributing company was going to get, and the balance of the cash was what he was going to get. That was the way I understood it. Then Mrs. Taylor came in and she was simply told by Feigenbaum to make out a check for Francisco Distributing Company for \$4,900, which she did, and left. After Mrs. Taylor left the drugstore, the next thing discussed was about the rest of the money, the rest of the cash. At that time, Mr. Taylor and I were still dealing on a 200-case basis. That is what Mr. Taylor and I were talking about, and that is when the question of the cash came up. Mr. Feigenbaum at that time told us we would have to have \$1,050 [308] in cash. When Mr. Feigenbaum said we would have to have \$1,050, he said that after Mr. Taylor and I had informed him that we really only wanted to take 100 cases, He told us we would have to have cash, which would be the difference at \$64 a case between the \$4,900 we had paid by check and the \$12,000 the 200 cases would cost. It was when this figure came up that Mr. Taylor and I had the discussion that we had better only take 100 cases. We would have to give

(Testimony of Raymond C. Humes.)

\$7,900 in cash, or about that. That is when we receded from that position and told Mr. Feigenbaum we could really only handle 100 cases so we gave \$1,050 in cash. Mr. Taylor actually delivered it so that made \$4,900, and \$1,000, or \$5,900 for the liquor, plus \$500 I had given to Mr. Tucker, which made \$6,400, and \$50 for freight, and the freight was based on 100 cases, and not 200. I do not recall any time that Mr. Feigenbaum referred to a check that Mr. Taylor and I had to make in December for \$2,450. When I first went into see Mr. Feigenbaum I told him, Mr. Taylor and I, or Mr. Taylor told him, that he and I only wanted 100 cases. I don't remember that at that time Mr. Feigenbaum told us that he would have to have a check for \$2,450 for 100 cases.

Redirect Examination

By Mr. Colvin:

We were told that we would have to have a check for the number of cases at \$24.50 a case. I never was told why we had to pay the remainder in cash. I never asked him if we could pay the balance by check, rather than in cash. We were directed by Mr. Feigenbaum to pay that amount in cash.

FRANK DITO

recalled by the Government testified as follows:

I have certain deposit slips of the Francisco

(Testimony of Frank Dito.)

Distributing Company which are records of the Bank of America at this time. I have the deposit slip of the Francisco Distributing Company for the date December 11, 1943. Being that these are permanent bank records, I had a certified copy made. I have the deposit slip of the Francisco Distributing Company also for December 13, 1943, December 15, 1943, December 28, 1943, December 30, 1943 and January 2, 1944. I have copies of all of those. These are records which are kept in the regular course of business at the bank under my direction and supervision, in my custody, and I have brought them from the files of the bank today. These deposits are for one day.

The slip dated December 11, 1943 was marked U. S. Exhibit 36 for identification.

The slip dated December 13th, 1943, was marked U. S. Exhibit 36 for identification.

Exhibit 38 for identification was the slip dated December 15, 1943.

U. S. Exhibit 39 for identification was the slip dated December 28, 1943;

U. S. Exhibit 40 for identification was the slip dated December 30, 1943, and U. S. Exhibit 41 for identification was the slip dated January 2, 1944.

(The slips were marked U. S. Exhibits 36 to 41 for identification.)

(The Witness continuing):

In my testimony yesterday, I recollect stating it was Mr. Goldsmith who directed me to take charge of the collection of certain sight drafts to

(Testimony of Frank Dito.)

account. I see Mr. [310] Goldsmith here in the court room (indicating). I was personally acquainted with Mr. Goldsmith during that time. I would have to check the deposits to see if I took them in personally. From the copies I can tell that I did not. They were handled by different people. There was no one which was handled by me personally. I am familiar with the endorsement stamp of the Francisco Distributing Company during that period of time.

It was stipulated that Government's Exhibits for identification Nos. 26, 28, 29, 30 and 31 bore the endorsement stamp of Francisco Distributing Company, which were made by the Francisco Distributing Company.

The drawers of the checks dated December 9, 1943, December 11, 1943 and January 3, 1944, were drawn by Lou's Place. The checks in question were marked U. S. Exhibits 42, 43 and 44 for identification.

A further check, the drawer of which was Vogel, was marked U. S. Exhibit 45 for identification.

(The Witness continuing):

I have been employed by the bank 22 years. I am familiar with banking practice in this district. I am familiar with the various methods of identifying checks on deposit slip and among those is the method of writing certain numbers to identify a bank. Each and every bank has a number so all customers will put the number on the deposit tag instead of writing the name of the bank. (90)

(Testimony of Frank Dito.)

is some sort of a code number. Each state has a different number. For all the banks in San Francisco the code is (11); (90) is California outside of San Francisco. 16-202 is drawn on Bank of America, Vermont and 48th Avenue Branch in Los Angeles. The same identification would be in order for these other Clearing House numbers. [311] They would each refer to particular banks.

WALTER J. VOGEL

called as a witness on behalf of the Government, having been first duly sworn to testify to the truth and nothing but the truth, testified as follows:

I reside at 367 Earl Street, San Francisco. I am a tavern owner. The name of the tavern is the "Toreador Club". I don't even own it now. I owned that tavern during the months of December, 1943 and January, 1944. During that period of time I purchased some Old Mr. Boston Rocking Chair Whiskey in cases of fifths. I don't know the fellow from whom I purchased it. I made the buy at San Francisco Liquor Company. I made it at my place of business. A man came in after I was there about three weeks and wanted to know if I could buy some whiskey, and I said "Yes, I needed whiskey", and he asked me if I could take 100 cases. I don't know the man. He was kind of a dark man, medium size, so far as I can recall, and I couldn't say whether he had on a light or

(Testimony of Walter J. Vogel.)

dark suit. I was only at the place three weeks, and everything was strange to me. I had been running this place three weeks when this man came to see me. He came in around four o'clock.

Government's Exhibit for identification No. 45 is my check. I wrote that check myself. That is my signature. I saw the man on the day I wrote the check. I gave it to that man. He told me to make out the check. I wrote this check at the direction of that man. That is on the date I bought Old Mr. Boston Rocking Chair Whiskey.

Q. Did you give any cash to this man in addition to this check? [312]

Counsel for the defendant Goldsmith object to the question as being without foundation.

The Court overruled the said objection, to which counsel for the defendants Goldsmith and Feigenbaum duly Excepted, and the Court allowed an Exception as to all the defendants.

(The Witness continuing):

I did not give any cash at that time to this man when I gave him the check. After he brought me the bills, I gave him the cash. He told me I would have to pay him for getting the whiskey. I have seen a document entitled, "Francisco Distributing Company, No. 10092". I received this document from that man about an hour and a half or two hours after I gave him the check; he came back with this. Both of these transactions took place on the same day, which was December 6, 1943. When he came back about one hour and a half

(Testimony of Walter J. Vogel.)

later, I am sure he was the man to whom I had given the check. I think I gave him \$3,400 in cash. I paid \$24.50 for the whiskey. That was for 100 cases. (To the Court): I mean, \$2,450, or \$24.50 a case, for 100 cases. We talked about the whiskey. That took place in my place of business about four o'clock. There was no one present beside this man and myself. He asked me if I wanted to buy whiskey. I said yes, I needed whiskey very bad. He asked me how many cases. I said, "Well, how many can you get me". I thought he was going to say 10 cases, but he said, "I can get 100 cases". I said, "All right, I will take 100 cases", so I asked him how much is it, a case. He said, "It is \$24.50 a case". I said, "Is that all". I thought it was kind of cheap. So, he said, "Well, that is all for the whiskey". But he said, "Now, then, you have to pay me for getting the [313] whiskey for you". So then he told me to make him out a check for the whiskey. I think he wanted the cash, and I wouldn't give him the cash until he brought back the bill, so he brought back the bill. I gave him the cash that he asked. I think it is \$3,400. We figured it out later. The whiskey stood me \$59 a case. I did not have a conversation about the ceiling price with him. He told me to make out the check to the Francisco Distributing Company for \$2,450. I subsequently received 100 cases of Old Mr. Boston Rocking Chair Whiskey in cases of fifths. I checked the shipment after it arrived in the warehouse. I kept it in the

(Testimony of Walter J. Vogel.)

San Francisco Warehouse Company. I would draw on it two or three cases at a time. It was put in my name, and I paid the storage. It was left in the warehouse in my name. I wouldn't say the man who sold me the whiskey was a heavy-set man. He was about a man of medium build. As I remember, he was a dark-complected man. I didn't notice any peculiarities of speech that he had, or any other outstanding physical characteristics.

Invoice of Francisco Distributing Company No. 10092 was marked U. S. Exhibit No. 46 for identification. [314]

FRANCIS DUFFY,

called as a witness by the Government, and having been first duly sworn, testified:

Direct Examination

By Mr. Colvin:

I am in the tavern business at 6398 Mission Street in Daly City, and was in that business, in partnership with my father, in the months of December, 1943, and January, 1944. During December, 1943, I made a purchase of some Old Mr. Boston Rocking Chair Whiskey. This check, dated December 7, 1943, to the Francisco Distributing Company, now shown me, for the sum of \$2,000, is my check. The \$2,000 and the signature and the date were written by me, but the name of the Francisco Dis-

(Testimony of Francis Duffy.)

tributing Company was put in, written in there, by the fellow that I made the transaction with.

The document was marked U. S. Exhibit 47 for Identification.

This check dated December 17, 1943, for \$450, payable to the Francisco Distributing Company, was written the same as the other one, all except the name of the company. That is my signature, which appears thereon. I bought it from a fellow whose name I didn't know at the time. The whole transaction took place in my place of business. I imagine he was a fellow about six-foot-one, weighed about 185 pounds, kind of brunet, wasn't as dark as you, and still wasn't too light, either. I gave the check marked Government's Exhibit for Identification #47 to that man on December 7th.

The second check referred to was marked U. S. Exhibit No. 48 for Identification. [315]

The Witness (Continuing): I gave this check (Government's Exhibit 48 for identification) to that man. The date of my first conversation with the man was about the 3d or 4th of December, and took place at my place of business. I was the only one present. My father was sick. I imagine the time of the conversation was in the early part of the afternoon, around 1:30.

Counsel for the Defendants Feigenbaum, Blumenthal and Goldsmith Objected to the question as not binding upon any of the said defendants, and, the United States Attorney having stated that the

(Testimony of Francis Duffy.)

testimony was offered particularly as to the defendant Goldsmith but as to all the defendants,

The Court stated that the testimony would be admitted only as against the defendant Goldsmith, and not as against the other defendants, to which ruling counsel for the defendant Goldsmith Ex-
cepted.

The Witness (Continuing): I have looked around and haven't been able to see this man in the court for two days now. He said to me, "I understand you are interested in getting some liquor," and I told him I was. And he told me, "Well," he says, "I may be able to get you some." So I said, "Well, I would appreciate it very much, providing the price didn't go too high." So he said, "I will be back and see you in a few days." So he came back. At the time of this first conversation there was no mention made of the brand of whiskey at all. I told him I could take as high as 100 cases if I could get it. I did not give him any check on the first occasion. I did not have any other discussion with him on that first occasion. I had a conversation with him at a later time, after that first conversation on the 7th at my place of business. Nobody overheard the conversation at all. The first time the conversation took place around 1:30 in the afternoon. He came back again and said, "Well, I [316] think I have some liquor lined up." I said, "That's fine. How much is it going to cost me?" "Well," he said, "it is \$24.50 a case is the price, but to make a certainty of getting the liquor, there will

(Testimony of Francis Duffy.)

be a little premium." I asked him how much the premium would be. So he said twenty dollars a case, so I said "All right." He said, "Well, I will take a \$2000 check now and when I come back again to give you the bill to get the whiskey out of the warehouse, you will have another check, \$450, and the additional \$2,000 in cash. He told me the additional money must be paid in cash. He did not say why it must be paid in cash. I had no further conversation with him at that time. The brand name hadn't been mentioned yet. I understood it was to be fifths of whiskey. I knew it was going to be a blend of Bourbon whiskey. That is all. He said it was to be a blend of Bourbon whiskey. He said I would have it some time between the 17th and the first of the year. He said he would be back to see me as soon as he had the bills to release the goods from the warehouse and everything straightened out. I had no more discussion with him whatsoever. I gave him the check for \$2,000 on the 7th. I did not see him write the name of the payee Francisco Distributing Company. He had not told me where the whiskey was coming from. The name of the payee was left blank. After the 7th of December I saw that man on the 17th in my place of business and had a conversation with him, at which nobody was present that overheard the conversation. He came and told me he had the warehouse release slip, and that he would pick up the check for \$450 and the additional money in cash. I had received no invoice as yet. That is all the conversation that I

(Testimony of Francis Duffy.)

remember. Then I found out what kind of whiskey it was, and where it was billed through. He just told me it was Rocking Chair Whiskey, and I was to pick it up at the San Francisco Warehouse. He never made mention of the [317] fact that the money was going through the Francisco Distributing Company. I have seen Francisco Distributing Company invoice No. 10081. It came into my possession in the mail a few days after I had picked up the merchandise on the 22d of December, 1943. I went in a truck to the San Francisco Warehouse and picked up the whiskey there. The fellow and I who had the truck loaded it on the truck. The fellow with me was Vincent Markey. He ran our fruit and vegetable delivery service. I imagine the invoice came to me 3 or 4, maybe 5 days after that date. That was the first I saw the invoice. I have never seen this man since. On the 17th when I gave him this check for \$450 I gave him \$2,000 in cash. He didn't say anything about the ceiling price. I had no further transaction regarding this whiskey.

The Invoice, Francisco Distributing Company, No. 10081, was marked U. S. Exhibit 49 for Identification.

Cross-Examination

By Mr. Duane:

I never went to the Francisco Distributing Company. The fact is that I went to the San Francisco Warehouse Company.

ANGELO LOMBARDI,

called as a witness on behalf of the Government, and being first duly sworn, testified:

Direct Examination

By Mr. Colvin:

I am a tavern owner in Santa Rosa, and have operated that tavern since 1940, and was engaged in the operation of that tavern during December, 1943, and January, 1944. During those months, I purchased 100 cases of Old Mr. Boston Rocking Chair [318] Whiskey. I did not give both check and cash to the same party. I paid cash for the whiskey to a fellow in the Sportorium on Third Street, between Mission and Market. I see that man in the courtroom, the man with the glasses, sitting down.

(The witness identified the defendant Blumenthal.)

The Court stated, in response to a question by counsel, that this evidence would be limited to the defendant Blumenthal.

The Witness (Continuing): I paid \$3,050 in cash to Mr. Blumenthal. It was between the 15th or 18th somewhere around in there. I don't quite remember the date. I have brought invoices with me. I bought 100 cases of whiskey. About the 15th Mr. Minkler contacted me about the whiskey. Mr. Minkler was a tavern owner at Santa Rosa. He contacted me at my place of business. We went to San Francisco, and we bought this whiskey around

(Testimony of Angelo Lombardi.)

the 18th of December. The first time we went to the Sportorium. I went to the Sportorium with Mr. Minkler. I did not see Mr. Blumenthal at the Sportorium the first time. I went into the Sportorium and Mr. Minkler went and talked to somebody and I stayed in front there looking at some fishing poles and things he had. Mr. Minkler went in the back room there. I didn't pay any attention.

(To the Court): I did not see this man I was with talk to Mr. Blumenthal on that occasion. On that occasion I did not have any conversation with Blumenthal. After Mr. Minkler came out of this room, he said they got in contact with somebody and the whiskey was O.K. Then Minkler and I went back to Santa Rosa. We next came to San Francisco around the 20th of December. I am not exactly sure about the date. Around the 20th of December I came to San Francisco with Minkler. I went to the Sportorium with \$3,050 in cash. On that occasion I saw Blumenthal at the Sportorium. All three of us went [319] together in the back room and paid the money to Mr. Blumenthal, laid it right on the shelf. No one else was in the back room beside Blumenthal and Mr. Minkler and myself. At that time I did not have any conversation with Mr. Blumenthal. I did not say anything as I gave him the money. I was just leaving it all up to Minkler. I don't know whether Minkler said anything. I left, and they talked a little while. We left. They said, "The whiskey will be up there in a few days.

(Testimony of Angelo Lombardi.)

Mr. Minkler said that. I went back to Santa Rosa with him.

Q. What happened back at Santa Rosa regarding this transaction?

Counsel for the defendant Blumenthal Objected to the question as hearsay and not binding on the defendant Blumenthal. The court overruled the objection to which ruling counsel for the defendant Blumenthal Excepted.

The Witness (Continuing): * * * We just left there, and Minkler went back to his own place of business and I went back to mine, and about 2 or 3 days after, he called up and says that the whiskey was on its way.

Counsel for the defendant Blumenthal objected to this evidence and to anything that happened between Minkler and the witness. The Court overruled the objection, to which ruling counsel for the defendant Blumenthal Excepted.

The Witness (Continuing): I received a phone call from Minkler. He said, "The whiskey will be up in a few days." About Friday the whiskey arrived, 100 cases, by Sonoma-Marin Freight Company. That is my signature on the check for \$2450 shown me. I wrote the check out and delivered it to the name on there, Clyde Minkler. I wrote the check for [320] \$2450 at the instructions of Clyde Minkler.

(The check was marked U. S. Exhibit No. 50 for identification.)

I have seen the invoice now shown me of the

(Testimony of Angelo Lombardi.)

Francisco Distributing Company, No. 10147-A. That came in about the first of January, in the mail. It was in the complete form that it is now, when I received it. The words "Salesman Weiss" were on there when I received the document. I noticed them at the time. Since that time this document has been part of the files and records of my business. The records are kept by myself.

(The invoice was marked U. S. Exhibit 51 for identification.)

The Witness (Continuing): I received 100 cases of fifths of American Distillers Rocking Chair, Mr. Boston, blended bourbon about the 3d of January. I had no further transaction regarding the purchase of this whiskey. I last saw Mr. Minkler about last November. He sold out and went to New Mexico or some place. I have not seen him since approximately last November.

Cross-Examination

By Mr. Riordan:

I have been in the liquor business in Santa Rosa since 1940. Before that I was working as a bartender. This is the first bar of my own that I have had. I have bar-tended for other outfits. I am a native of California. I have never been convicted of a felony outside of speeding. I asked for 25 cases, but Mr. Minkler said I had to use 100. I could use it. We knew we couldn't get it before the Christmas holidays. I haven't seen Mr. Minkler

(Testimony of Angelo Lombardi.)

since around November or a little later. I don't know the exact date; it was when he sold out, the last time I saw him. We went down here together. He is now in New Mexico. That is all I know where he is. I don't know where in New Mexico. I have not talked this case over with the government officers on a [321] number of occasions. We just talked about the case when I was subpoenaed down here, that's all. I talked to Mr. Roy Johnson. We haven't talked about the case. I have not talked to anybody else. I went to the Sportorium to deliver the money. Mr. Minkler did the negotiating, and I remained in the front. He did all the business. All I know, I gave my money in the Sportorium. I did not give a check in the Sportorium. I gave the check to Minkler. I testified before the State Board of Equalization in the same matter. The officers from the State were the first ones that brought us in. They talked to us about the same. The State were the first people to talk to me. I am operating under a regulation State Board of Equalization license. When I testified before the State Board of Equalization, I was asked to describe the man I talked to in the Sportorium. I don't know that I described him as a man who was smooth-shaven. I don't remember that. I do not remember whether the man I saw in the Sportorium was smooth-shaven or not. It was dark in there. I could not tell if he was dark or what. Went in the back room. That was the only conversation I had with him. I don't remember whether or not I testified before

(Testimony of Angelo Lombardi.)

the Board of Equalization that the man wore glasses or not. I testified before the Board of Equalization the man was dark. I think he was dark. I am pretty sure that is what I said at that time. Mr. Blumenthal has not been pointed out to me at any time since this alleged transaction by anybody other than here in court today. I don't know the man's name at all. Nobody at any time along the way since December 1943 and January 1944, whether they were officials or otherwise, said, "There is a man who is known as Blumenthal to you." At the hearing before the referee of the Board of Equalization of the State of California on January 19, 1945, in the State Building of San Francisco, before Referee A. E. McDonald, in the matter of the complaint of George Stout, Liquor Administrator, against Harry Blumenthal, file No. 37945, [322] at page 72, commencing at line 3 and ending at line 20, I was asked the following questions and gave the following answers:

"Q. In some of these statements you have made you were under the impression that the man you talked to down at the Sportorium was about fifty years old? A. I am not sure.

Q. He may have been fifty or more?

A. Yes.

Q. Is that correct? A. I don't know.

Q. You don't remember the color of his hair? Didn't we have—

A. His hair was dark, I remember that, and he was dressed in dark clothes.

(Testimony of Angelo Lombardi.)

Q. Anything else about him that you recall?
Would you say he was about six feet tall?

A. About five eleven or twelve.

Q. Weighed a couple of hundred pounds?

A. A pretty big man.

Q. Light complexioned?

A. It was light in the corner, but where they called me over it was pretty dark in there.

Q. He was smooth shaven, nothing on his face?

A. Yes.

Q. Do you remember whether he wore spectacles or not?

A. No, I don't think he did.

Q. You saw him just once?

A. Yes.

Q. That is all."

I thought he was about that. It was just the once I saw him. My memory is about the same at a later date as it was at this earlier date when I gave the testimony. I was at the Sportorium twice. I was there for a very brief time on each visit. The first time I don't think it was three minutes or more. At the time of my first visit I was in the front of the store. The second time it was longer than 3 minutes. Mr. Minkler had a talk with him and we had to go in the back room. It took a little longer than 3 minutes. I went there afterward just as a [323] matter of passing the money, and out. It would have been more than a minute or two. Probably 2 or 3 minutes. I don't pay any attention to the time. Once is all I remember seeing Mr. Blumenthal. I didn't pay much attention to him.

Before the recess I stated that I only talked to

(Testimony of Angelo Lombardi.)

one officer, and that was Mr. Johnson. We just talked about different things. I talked to state officials and asked them how they were. We never did discuss here about it. I remember a man by the name of Mr. Worthington, who was connected with the Office of Price Administration. I gave him the same statement I gave the rest. He wrote it down. I signed it. He did not give me a copy of it. I didn't say that Mr. Blumenthal was the man that saw that I got the whiskey. I was doing business with Minkler. I told him if I could see him—I couldn't describe him, because it was just a few minutes I saw him all at once. They did not tell me that if I did not tell them who the man was that was dealing with me that I would be indicted, nothing of that kind at all. I was never indicted for this transaction myself in any other separate indictment. I have never had any charge by the federal government placed against me that I know of; the State Board of Equalization has placed a charge against me. We had a case up there about it. My license has not been taken away. I am still doing business. At the hearing before the Board of Equalization I was asked the following question and gave the following answer:

“Q. If you were to see the individual, Mr. Lombardi, that you talked with at the Sportorium on Third Street, would you be able to identify him?

A. Well, I don't know if I could or not. I didn't do any talking with him. I didn't see him long.

(Testimony of Angelo Lombardi.)

That was the first time I seen him. I don't think we were in there five minutes." [324]

Cross Examination.

By Mr. Weiss:

I do not know a gentleman by the name of Mr. Weiss. I have never met a man by the name of Mr. Weiss. (To Mr. Weiss:) I have never had any transaction with you.

Re-Direct Examination

By Mr. Colvin:

At the time these questions and answers were put to me on the occasion Mr. Riordan, counsel for Mr. Blumenthal, reminded me of, Mr. Blumenthal was not in the room. I did not have a chance to observe Mr. Blumenthal at the time. During the time of that hearing, he was not present at any time. I did not have an opportunity to see him before the date that I was subpoenaed for this case. The first day I walked in the hallway there, I saw him in there. I remember it was him. I don't know if he had a moustache or not.

HERMAN FINGERHUT

called as a witness for the Government, and being first duly sworn, testified:

I have the Forum Cafe in Vallejo. I have been in business up there six years, and was in business

(Testimony of Herman Fingerhut.)

during the months of December, 1943, and January, 1944. During that month I purchased some Old Mr. Boston Rocking Chair Whiskey. I don't know the man's name from whom I purchased that whiskey at the time. I went to the Sportorium and contacted the man there.

In response to a question by Mr. Dunne,

The Court stated: "This testimony is received as to the defendant Blumenthal."

The Witness (continuing): "The place where I purchased this [325] whiskey was the Sportorium. I don't know the exact day, the first time I went in there, but I imagine it was the first part of December. I paid \$55 a case for this whiskey. As close as I remember, I first went to the Sportorium about the 3d or 4th of December. I seen a man there—I don't know his name. I think it is that man in the last row there, something similar to that man. I am referring to that man with the brown suit. (To the Court:) Mr. Blumenthal is the man I have in mind. That was the man I saw. On the occasion of my first visit to the Sportorium I went alone. I had a conversation with that man on that occasion. Just the two of us were present at the conversation. I imagine it was the early part of the afternoon. The conversation was regarding some whiskey. At that time I didn't know what kind of whiskey. All I knew I could get some whiskey. What it was I don't remember. I was not told. I told him I needed some whiskey. He told me he could probably get it for me. I said I could use some, and he asked me

(Testimony of Herman Fingerhut.)

how many cases I could use. I said at the time around 200 cases. He said well, he could take care of me. He told me the price was \$55. I had to pay \$24.50 a case and make out a check for that and the rest was in cash. He told me he didn't know exactly when I could get the whiskey. He said he will get it in the latter part of the month, as soon as it comes in, if he would let me know. I had no conversation with him about the check, outside of him telling me to make out a check. The first check I made out was for \$2,000. I did not make it out on the occasion of my first visit. The first time there was no mention about a check at all, because the first time I went to see him I did not know whether I could buy the merchandise, because it was too much money for me to pay. That is the only conversation we had the first time. He didn't say he would get in touch with me. He did not say to come back. I went home, and I told him if I decided I wanted to [326] buy it, I would come back and see him. There was no further conversation the first time. Pursuant to that conversation I went back, I imagine 3 or 4 days after that, maybe a week; I don't know exactly. That would be something like the second week in December. Nobody went with me. On the second visit I went to the Sportorium on Third and Stevenson. I went alone. I know where Market Street is in San Francisco; the Sportorium is one short block away from it. It is right on the corner of Stevenson and Third. On this second visit to the Sportorium I saw Mr. Blumenthal. I had a con-

(Testimony of Herman Fingerhut.)

versation with him regarding this whiskey. Just him and I was present. This was early in the afternoon. The conversation took place in the back of the Sportorium. I told him, "I am ready to buy some of that whiskey" but I could not handle 200 at the time, I could only handle 100, but I knew somebody who would take the other hundred cases. He said that was all right. There was no other conversation, outside I told him who the other party was, a man by the name of Walter Travis. I didn't know what kind of whiskey it was going to be at that time. It was going to be a blend. He told me the whiskey was going to arrive about the end of the month. He did not know exactly. There wasn't much said outside I told him I was going to take a 100, and Travis was going to take the other hundred, and then I give him a deposit on it of \$4000 in the form of four one-thousand-dollar bills, which I got from the Bank of America right on Powell and Market, I think; I don't know exactly where. At that time he said he wanted cash now and the check would come a little later. He did not give me any instructions then regarding the writing of the check. The total cash payment from that conversation was \$4,000 then; I paid him \$4,000 the second time and I think we were supposed to pay him some more money later on. I was not taking 200 cases, I only took 100, so it only cost me \$4,000, and I think Mr. Travis gave him money [327] later on, I believe. When I gave him the \$4,000, I said it was for 200 cases at that time. That conversation

(Testimony of Herman Fingerhut.)

took a couple of minutes. (To the Court:) All that transpired was I gave him \$4,000 in cash at that meeting. I had another meeting later on. Mr. Travis and myself were present at that meeting, which was a few days later, I think. I told him Mr. Travis was taking the other hundred. (To the Court:) I won't say for sure I saw Mr. Travis pass the money. All I do know is I said that Mr. Travis was going to take the other hundred and I was going to take that hundred, that's all. The third time I gave Mr. Blumenthal a check for \$2,000. He told me to make it out to the Francisco Distributing Company for \$2,000. That one hundred cases of whiskey was delivered to me. The 200 cases were delivered in one place, in Mr. Travis' warehouse, and I went and got my hundred from the warehouse. That was Old Mr. Boston Rocking Chair Whiskey. This invoice of the Francisco Distributing Company (marked U. S. Exhibit 52 for identification) came into my possession before I got the whiskey. I got this from the man at the Sportorium, after I give him the \$2,000; he give me this and I owed the balance of \$450. (To the Court:) I paid that on a check; the \$450 was in a check to the Francisco Distributing Company. I don't know about this "G" with a line under it on the face of that document. (To the Court:) I didn't put it on after I got it. It is in the same condition as when I first got it. I made a later purchase of Old Mr. Boston Rocking Chair Whiskey about the 3d or 4th of January. I purchased that whiskey from the same place and

(Testimony of Herman Fingerhut.)

from the same man. I bought 25 cases. I paid for that whiskey \$55 a case. I received that whiskey about a week later. I think a week or two later, I don't remember exactly. Mr. Travis give me an invoice of the Francisco Distributing Company, now shown me, No. 10151, which is now shown me. I don't know where he got it, but he [328] give it to me as soon as he come back from the city.

The document was marked U. S. Exhibit No. 53 for identification.

The Witness (continuing): That invoice arrived before I received the 25 cases of whiskey. The 25 cases of whiskey came together with—there was 100 altogether, and Travis got 75 and I got 25. I don't know the exact date when that did come. He received it. I give my money to Mr. Travis to bring down, because I didn't come down to San Francisco any more.

(To the Court:) I talked with Mr. Blumenthal about buying 25 cases. I don't remember the exact date. All I know is I got a telephone call wanting to know if I needed any more whiskey.

The check now shown me, (U. S. Exhibit 54, marked for identification) on the Bank of America, Vallejo Branch, for \$4,000, payable to "Cash," is in my handwriting. I signed it myself. I made it out at the bank. I think the one on Powell and Market, Bank of America. It is marked here, "November 24." I cashed it in, and got \$4,000 for it. That is the \$4,000 to which I have referred. The date

(Testimony of Herman Fingerhut.)

of that was November 24, 1943. I made out the check now shown me dated December 9, 1943. That is my signature that appears thereon. I made that out at the Sportorium on December 9, at the instruction of the man who was with me. He told me to make the check payable to Francisco Distributing Company, for \$2,000. Mr. Travis was with me at that time. At the time I gave the check to Mr. Blumenthal for \$2,000, I gave him \$1,050 in cash.

(The document was marked U. S. Exhibit No. 55 for identification.)

I made out the Bank of America check now shown me, dated December 12, 1943. That is my signature thereon. I made that check out at home. I mailed it to the Francisco Distributing [329] Company at the direction of the man from the Sportorium. There was a balance of \$450, and I was told to mail that later on. I don't think he told me what date. I received the invoice of the Francisco Distributing Company (U. S. Exhibit 52 for identification) from the man at the Sportorium. I believe he wrote that "Received \$2,000" and "Balance \$450." When he handed me this invoice he said, you just owe \$450, and that is all at this time. That was not the time he told me to write that \$2,000 check—the \$450—no. I don't know just when he told me to write it. I wouldn't say for sure. I paid no more money in any way than that which we have named for the first 100 cases that I bought during the month of December. The Bank of America

(Testimony of Herman Fingerhut.)

check now shown me to Francisco Distributing Company for \$612, I wrote out at home. That is my signature that appears thereon. I wrote it about December 30, I believe, at home. After I wrote the check, I gave it to Mr. Travers (Travis). I gave Mr. Travis some cash. I don't remember how much right now. The difference between that and \$24.50 and \$55.00. This check is made out for 25 cases at \$24.50 a case, and the whiskey cost \$55, and the difference I gave him in cash.

(The document was marked U. S. Exhibit 57 for identification.)

During the month of December I received \$2,000 in cash from Mr. Travis. That was after the date on which I had paid Mr. Blumenthal \$4,000 in cash. I received the \$2,000 from Mr. Travis about the same time we went down and paid the \$2,000 in cash. I received the \$2,000 cash from Mr. Travis. I think in his place of business in Vallejo. It was just before the third trip we made to the Sportorium.

Cross Examination

By Mr. Riordan:

I have never been indicted for a felony. I am in the [330] liquor business myself in Vallejo. The name of that place is Foreign Cafe. I have been there about six years. Before that I worked in a radio shop. This was my first venture in the liquor business. I went to lunch at noon today with Mr. Travis and Mr. Johnson, the government man, and

(Testimony of Herman Fingerhut.)

Mr. Patterson from Vallejo, and Mr. Harkins, and Mr. Lombardi. We did not talk the case over during the noon hour. We did not talk a thing about the case. Nothing was said to me about what transpired after I was ordered out of the courtroom this morning. I said I wished the case was over. They just laughed about it. I wanted the whiskey very badly. I came here to San Francisco practically daily to get some whiskey, so I could keep operating. That is the true picture. I didn't know Mr. Blumenthal. Nobody came to help me solicit some whiskey for this transaction. I asked somebody else where I could get some from. I think his name is Derrow. I don't know him well at all. He was at the 365 Club in San Francisco. I am only in California seven years. I first met him at the 365 Club. He was playing in the orchestra there. I have been there about five times. I did not see him at any other place except the 365 Club. I think this man's name at the 365 Club was Derrow. I got acquainted with him. I don't remember how I got acquainted. I don't think he took me to the Sportorium. I don't know whether he took me there or not. I don't remember whether he took me right there, or not. I know we got acquainted. I don't know whether he took me there or not. I just made the remark, "It looks like I'll have to close up; I need some whiskey." He said well, maybe he knows somebody who would get me some. I didn't exactly say, "Will you help me buy some whiskey?" I asked him if he knew where I could get some, if he

(Testimony of Herman Fingerhut.)

could get me some. He said, "I'll try to help you."

He didn't have any whiskey there. That place was a sports shop, that includes fishing tackle, shotgun shells, all sorts of sporting paraphernalia. I went into the Sportorium [331] about three times, I believe. The first time I went in, I don't know how many people were in there, maybe one or two. These besides the man I talked to. On the second occasion about the same amount of people were in there. I didn't see anybody in there, outside of the clerks, one or two clerks there. They were working there. I am just assuming that; I didn't know the boss, and when I say clerks I am just assuming that. On the third occasion I imagine about one or two parties were in there. I have no recollection of just how many there was. To be fair with this jury, I would say I don't know how many people were in there on any one of those visits. The man I talked to in the Sportorium on each of these visits was the same man. I am sure of that. When this man wrote on this exhibit that I identify as "Received payment," etc., we were in the back room. It looked more like a stock room than an office. It did not have a desk there, just a kind of bench, shelves of some kind. It was not a place where they had some of the paraphernalia that goes with keeping receipts and disbursements. At the time he signed this particular document that I identified, Mr. Travis and this man and myself were present. That would have been the third visit. That had to do with the 200 cases of whiskey. I think that was Mr. Travis' first visit

(Testimony of Herman Fingerhut.)

as far as I know. I was questioned about this case before I ever was subpoenaed to come into the federal court or knew about a federal charge over in Vallejo. That was by the Board of Equalization. I made a statement that I did not know who sold me the whiskey. I didn't know the man's name. I did not exactly say that I didn't know who it was. It looks like the man back there. I was first interrogated by the state officials in Vallejo. In September, 1944. My memory is just about the same as it was then.

Q. Now, you were uncertain then, weren't you, as to who the man was?

A. Well, I haven't [332] seen the man since.

Q. I said when they asked you, you were uncertain then, and that still goes, doesn't it?

A. At that time, yes.

Q. You are still uncertain, aren't you honestly, as to who the man was?

A. Well, it looks like the man, is all. I am going by general resemblance. Those state officials wanted me to identify that man if I could. I said if I seen the man, I probably could. I didn't go to see him. I am still doing business under my license. Nobody has threatened to take it away from me yet. I have not been indicted. I have got no kind of either a federal or a state charge against me, or any local charge in the locality of Vallejo against me that has to do with my license. No official, either state or government, told me that if I did not identify somebody who gave me this whiskey, that I

(Testimony of Herman Fingerhut.)

would lose my license. I am sure of that. No general types of threats without any particular type of language, that if I did not come forward with information I would lose my license. I am equally sure of that. Nobody explained to me in either state or federal lines when I was a part of "this conspiracy" why I was not indicted or informed against or some kind of a charge put against me. No promises were made to me of any kind that I would not be indicted or informed against or charged by the State. I am equally sure of that. There were two local men whom I have talked to since the time the Old Rocking Chair Whiskey case arose, and I think one or two federal men—one state man, I know. There was Mr. Patterson, Mr. Leo from Vallejo, and I think Mr. Koster from the state, and Mr. Johnson from the federal, is all I can remember. I do not know what kind of whiskey I got; I assume I got whatever the label said. I don't know offhand that I sold the whiskey for \$200 a case over the bar. Not quite \$200; [333] probably \$150. I never charged the public any more for that whiskey as I dispensed it.

Re-direct Examination

By Mr. Colvin:

I sell by the drink. That is the only license I have.

WALTER H. TRAVIS,

called as a witness by the Government, and having been first duly sworn, testified:

Direct Examination

By Mr. Colvin:

I am a tavern owner. The name of my tavern at that time was Lou's Place, 717 Sonoma Street, Vallejo. I operated that place during the months of December, 1943, and January, 1944. During that time I purchased some Old Mr. Boston Rocking Chair Whiskey from a gentleman in the Sportorium on Third Street. I see that gentleman here, in the court-room. (pointing out the defendant Blumenthal). I bought 175 cases of Old Mr. Boston Rocking Chair Whiskey from Mr. Blumenthal. I bought those in separate parcels twice. I bought 100 cases on the first occasion, I paid \$55 a case, \$5500 for that whiskey. I recognize Government's for identification No. 44, check for \$2,000. That is my check. I wrote it, and that is my signature. After I wrote it I carried it to the Sportorium on Third Street in San Francisco. I did not write it in the Sportorium. I carried it in there. I wrote the check about December 9. I was told to make it out to Francisco Distributing Company by the gentleman at the Sportorium.

Q. You say the check was written before you arrived at the Sportorium. Will you clarify that testimony please?

Mr. Riordan: I submit he can't cross-examine his own [334] witness. There is nothing to clarify.

(Testimony of Walter H. Travis.)

The Court: If there is an objection, the objection is overruled and an Exception noted.

The Witness (Continuing): No part of the check was written in the Sportorium. That check was not written at the time of my first visit to the Sportorium. It was written the second. The date of my first visit to the Sportorium was somewhere around the 9th of December. Mr. Fingerhut went with me on that occasion. "Government's for identification No. 55" is not my check. I did not write any of Government's for Identification No. 44, check for \$2,000, at the Sportorium. I wrote that check at my office in Vallejo about the 9th of December. I don't know that there was anyone present beside myself when I wrote the check. Mr. Fingerhut told me to write that check. That check was entirely made out when I arrived at the Sportorium. When I took the check and the money I had a conversation with Mr. Blumenthal on that occasion. That was the occasion of the 9th to which I have just referred. That was the occasion of my first visit; no one else was present at that conversation beside myself and Mr. Fingerhut and Mr. Blumenthal. It was just before noon. The conversation was that we come and pay the money to get delivery of the whiskey. The name of the whiskey was mentioned, I think. I think it was named: we would get 100 cases of Rocking Chair Whiskey; that was what was said. We was to send him a check for \$450. Mr. Blumenthal said that he told me to send the check to the Sportorium. I had to take \$1,050 down

(Testimony of Walter H. Travis.)

at the time I took this check. He just said that we would have to pay \$2450 for the 100 cases by check to the Francisco Distributing and the \$1,050 to him in cash. On the occasion of that conversation I gave \$1,050 to Mr. Blumenthal. I did not have any further conversation with him at that time. I have seen that check [335] for \$450, Government's for identification No. 43. That is my check. I wrote it at my office. That is my signature. I mailed it to Mr. Blumenthal to the Sportorium. I have seen this Francisco Distributing Company invoice No. 10086. I saw that for the first time when I delivered the check and the money. That was on the occasion of my first visit to the Sportorium. Mr. Blumenthal gave me that invoice. He wrote this: "\$2,000, balance due \$450." He wrote that in my presence, "Received on account \$2,000; balance due \$450." Since that time this invoice has been part of the files of my business. I keep them in my custody.

(The document was marked, U. S. Exhibit 58, for identification.)

With reference to the first 100 cases of whiskey I gave Mr. Fingerhut two thousand dollars in cash. I have seen the document now shown me, a draying company bill, Kellogg Express & Draying Company, 100 cases of liquor. I saw that when the stuff was delivered to 1800 Sonoma Street, my place of business. I got that bill from the expressman. This bill arrived with the 100 cases of whiskey.

(The document was marked U. S. Exhibit 59 for identification.)

(Testimony of Walter H. Travis.)

I was told the whiskey would arrive in a few days after he got the \$450. I was not told any special date. I was told when to send the check for \$450. I made a subsequent purchase of 75 cases for \$55 a case from Mr. Blumenthal at the Sportorium during December, 1943, or January, 1944. At that time I bought 25 cases of Old Mr. Boston Rocking Chair Whiskey for Mr. Fingerhut, about the third of January. I have seen this Francisco Distributing Company invoice, No. 10152. It was given to me by Mr. Blumenthal at the Sportorium about the 3d of January. I have seen Government's Exhibit No. 53 for identification— [336] the invoice to the Foreign Club. I got it at the Sportorium at the same time I did the other one. I took it back to Vallejo and gave it to Mr. Fingerhut.

(The invoice to Lou's Place was marked U. S. Exhibit No. 60 for identification.)

I think I made two or three trips altogether to the Sportorium. I do not remember—two or three, could have been three trips. There could have been a trip from the time of the first purchase to the second purchase. According to my best recollection that was about December 30th, something like that. I only had a conversation at the Sportorium with Mr. Blumenthal. Mr. Fingerhut was present at that conversation. That conversation was some time in the forenoon. All I know about the conversation was that we were to divide the hundred cases, I was to take 75 and him 25, and I was to bring the money in. The best of my recollection was

(Testimony of Walter H. Travis.)

I was to put the money and the checks there for the last payment—the date I can't remember. I did not make any trip to the Sportorium after I paid for the 75 and the 25 cases. It was on that occasion when I paid for the 75 and the 25 cases that I got those invoices which I have here, No. 53 and 60 for identification. When I held the first conversation with Mr. Blumenthal we started out in the back of the store. There is a room back there. We went into the back room, just kind of a crude structure; it was not plastered. Kind of a little warehouse, like. On the occasion of my first trip there, there was no one in the store. I think there was a clerk in the front; I don't remember. On the occasion of my second visit, we held our conversation in the back part of the store, not in the room, but in the back part of the store.

Cross-Examination

By Mr. Riordan:

My place of business is known as Lou's Place. I had [337] operated that place at that time about 7 months. I had not operated any other place prior to that in the liquor business. At that time I had only been in Vallejo about 4 years, but I lived there before, in and out. I am not a native of California. I have never been indicted for a felony. I haven't any indictment out of this case pending against me. I have no other state charge or local charge against me out of this case. I was very anxious to get liquor for my place so my place could continue to operate and continue to do business up there. Mr. Finger-

(Testimony of Walter H. Travis.)

hut told me I could get some liquor and I went with him to see if somebody would help me get it. There was no liquor in the back room where I say I negotiated the transaction. Mr. Fingerhut and I went to lunch at noon today with the officials. We did not talk over the case. Not one word was said about it. They didn't ask me any questions and I didn't ask them any questions, or make any statement concerning the case at all. We just had lunch together. We talked about other business, but not that. Mr. Fingerhut paid for some of the lunch and Mr. Patterson paid for some. I didn't do anything. I bought the dinner yesterday, for a different group. I saw Mr. Blumenthal write something on each of the invoices, No. 52 and 53, and the invoices to Travis, Nos. 58 and 60, about so much paid and the balance due, right on the show-case. As a matter of fact, I was taken by a government agent over to Mr. Blumenthal's place after this transaction had all finished and long after January, 1944, to stand out there while I looked with this government agent, while a man to whom I was shown, meaning this defendant, Blumenthal, came out of the store. That is what really happened. That was about the first of September, 1944, something like that. There was a little something said; I don't remember. Nobody said that I had better identify somebody who sold me some whiskey or else I might or possibly would lose my license. Nothing of that type or kind was said. [338] No threats of any kind were made to me.

(Testimony of Walter H. Travis.)

Q. But the truth is, you have never been indicted in this conspiracy that you were also in?

A. No.

Mr. Colvin: I ask that that be stricken.

Mr. Riordan: Well, it goes to the weight and credibility, your honor, and the interest and bias and prejudice, as to why he might be testifying.

Mr. Colvin: It is an assumption of counsel that the witness was in the conspiracy.

The Court Granted the Motion to Strike the Testimony, to which ruling counsel for the defendant Blumenthal Excepted.

The Witness (Continuing): I did not cash any check at the Sportorium. I am not sure whether I made two or three trips to the Sportorium. Mr. Fingerhut was not there with me on more than one occasion when these invoices were signed. The other occasion I was there alone. I paid the cash to the man who wrote the notation, whoever wrote on these invoices, that is the party I paid the cash to.

Redirect Examination

By Mr. Colvin:

During the month of September, 1944, I did not identify the defendant Blumenthal to any agent. I was taken up there to see if I could identify him, but I couldn't see him. I wouldn't identify anybody, I wouldn't say I did unless I know him. I didn't see the defendant Blumenthal between the time of those sales and the time of this trial. After

(Testimony of Walter H. Travis.)

all of this refreshment of my memory I still identify the defendant Blumenthal.

Re-Cross Examination

By Mr. Riordan:

The envelope I mailed to the Sportorium was addressed to the store, the Sportorium, not Blumenthal. [339]

EDWARD C. HARKINS,

called as a witness by the Government, and having been first duly sworn, testified:

Direct Examination

By Mr. Colvin:

I am special investigator for the Alcohol Tax Unit, working on the black market cases involving whiskey. My present office is Room 512 in the Custom House. I investigated this case with the assistance of others. I have had a conversation with Mr. Goldsmith regarding this case on several occasions. I was present early in January when Mr. Goldsmith and Mr. Weiss were together with special investigator Gaines. Mr. Gaines is a special investigator of the Alcohol Tax Unit. The conversation took place in the Empire Building, where we had our offices at that time. I believe there was an inspector by the name of Brunderol present. Inspector Wilson might have been present. (To Mr. Friedman): The year is 1944.

(Testimony of Edward C. Harkins.)

Q. Was that conversation regarding this case?

Mr. Friedman: I object on behalf of the defendant Feigenbaum, as not binding upon him.

The Court: This testimony with reference to any conversation with the defendant Goldsmith, of course it would not be admitted at the present time against the other defendants.

Mr. Dunne: As to the defendant Goldsmith, the objection is that there has been no foundation laid, and no proof of any corpus delicti of the crime charged in the indictment.

The Court: I will overrule the objection. You may have an Exception.

The Witness (Continuing): Special investigator Gaines was questioning both Mr. Weiss and Mr. Goldsmith regarding various shipments of whiskey. He asked them about these two carloads of Old Rocking Chair Whiskey, who purchased it, how it was [340] handled. Mr. Weiss, I believe, did most of the talking. He said that his firm received \$2.00 a case for clearing it through their books. Mr. Goldsmith concurred in that. Mr. Goldsmith and Mr. Weiss both stated that they divided the \$2.00, each taking a dollar. They both stated, agreed, that they did not sell any of the whiskey. It was sold by others, and they received the check generally for the payment of the whiskey in advance of the date that they had to take up the sight draft bills of lading. At that time they did not tell us who actually sold the whiskey. With relation to the dispo-

(Testimony of Edward C. Harkins.)

sition of these three carloads of whiskey, I think the conversation covered the import tax on this whiskey. After this conversation I had another conversation with Goldsmith regarding the facts of this case; early in September of 1944 in the State Building, San Francisco, was the next conversation:

Q. Who was present at the conversation?

Counsel for the defendant Goldsmith Objected to the question on the ground that the same was incompetent, irrelevant and immaterial and was after the conclusion of the alleged conspiracy in September, 1944, and also upon the ground that the corpus delicti had not been established.

The Court Overruled the Objection, to which ruling counsel for the defendant Goldsmith then and there duly Excepted.

The Witness (Continuing): Special Investigator Koster of the State Board of Equalization and Mr. Goldsmith and myself were present.

Mr. Colvin: Q. What was said relating to this case?

Mr. Dunne: The same objection, ruling and exception, if your honor please.

The Court: Very well. [341]

The Witness (Continuing): We questioned Mr. Goldsmith about who actually bought him the whiskey, who owned it, referring to these two carloads of Rocking Chair whiskey. He said that Blumenthal brought it in, and when asked if he knew of his own knowledge, he said, "No." We asked him

(Testimony of Edward C. Harkins.)

what he received for his share of it, and he said the Francisco Distributing Company received \$2.00 per case, of which \$2.00 he gave Weiss half, gave Weiss \$1.00. There was a little other question, but it was quite a short interview at that time. I did not show Mr. Goldsmith any documents at that time. I think that is the essential part of the conversation as to Mr. Goldsmith. After that time we had a conversation with the defendant Goldsmith at the office of the Alcohol Tax Unit on September 13, 1944. Mr. Goldsmith and his attorney, Mr. Duane, and, I believe, Mr. Roy Johnson of the Alcohol Tax Unit, and myself, were present.

Mr. Dunne: Same objection.

Mr. Friedman: Same limitation, Your Honor.

The Court: Same limitation, same exception noted by counsel for Mr. Goldsmith.

The Witness (Continuing): Mr. Goldsmith was further questioned about these two shipments of two carloads of Rocking Chair whiskey, and at that time I showed him several invoices that I had in my possession. Government's for Identification No. 22, Francisco invoices to The Brig was in my possession at the time of that interview, and I showed that document to Mr. Goldsmith then and there. I asked him who wrote it, and he stated that he wrote it himself, identified his handwriting. Government's for Identification No. 23, Francisco invoice to The Brig was in my possession then and there, and I showed that document to Mr. Goldsmith. I asked him who wrote this one, and he iden-

(Testimony of Edward C. Harkins.)

tified it as being in his handwriting and that he wrote it. Government's Exhibit No. 52, Francisco invoice to Fingerhut, [342] was in my possession then and there, and I showed that document to Mr. Goldsmith. I asked him who wrote this, and he said that he wrote it. Except, he said, he did not make the notations of the \$2,000. He said he didn't know who made that. I referred to the notation, "Received on account \$2,000. Balance due \$450."

The document now shown me, Government's No. 58 for identification, Francisco invoice to Travis, I showed that document to Mr. Goldsmith. He identified that document as being in his handwriting, all but the notation likewise on this. He said he didn't know who wrote that. I showed Mr. Goldsmith various other documents. He identified a number of the invoices that he wrote. He stated that he wrote most of the invoices, that a few were written by his bookkeeper. On that occasion I had other conversations with him relating to these two carloads. We again asked him about the deal and we got the same answer, that they received \$2 per case, and he stated at that time, I believe, that up to July 1, 1943, Mr. Weiss had been his partner, or on two occasions, I believe, he made the same statement, and that subsequent to July 1, Mr. Weiss was the sales manager but that he felt he was entitled to half the profits, and he divided the profits with him, including the \$2 per case received on this Rocking Chair whiskey. I did not have any later conversation than the one in which these documents were

(Testimony of Edward C. Harkins.)

identified with Mr. Goldsmith. I had one conversation later than January, 1944, with Mr. Weiss, on May 14, in this building. Beside myself and Mr. Weiss, Mr. Colvin was present.

Q. What was that conversation?

Mr. Weiss, in his own proper person, objected to the question, on the ground that it was subsequent to the termination of the conspiracy, and hearsay, and that the corpus delicti had not been established. The court overruled the objection, to which the said defendant duly Excepted. [343]

The Witness (Continuing): Mr. Weiss stated that it was true that he received half of the \$2 commission paid to the Francisco Distributing Company for clearing this whiskey through their books, and he finally refused to answer who actually owned the whiskey. He said "I don't want to involve myself." Mr. Weiss said he knew Mr. Blumenthal. He said he knew Mr. Blumenthal, but he refused to state, to the best of my recollection, positively, whether Mr. Blumenthal was the owner of the whiskey or not.

Counsel for the defendant Blumenthal objected to the evidence upon the ground that it was not binding upon the said defendant. The court overruled the objection, to which counsel for the defendant Blumenthal duly Excepted.

Cross-Examination

By Mr. Duane:

I am an agent for the Alcohol Tax Unit. I am a Special Investigator. I have been doing that work

(Testimony of Edward C. Harkins.)

almost 17 years. I was a Prohibition agent at one time. I wrote this case some time ago, and finished it outside of the trial. I referred to a conversation that took place in the office of the Alcohol Tax Unit in September, 1944, at which you were present. Mr. Clay Gaines was present. I did not say that I conducted such conversation as went on at that meeting. I was under the impression that Mr. Johnson was there. Possibly you are right that Mr. Johnson came in and went out. I believe to the best of my recollection Mr. Gaines was there part of the time. (To Mr. Duane): I do not recall that Mr. Gaines said to you at the conclusion of the meeting, "I call your attention, Mr. Duane, to the fact that there have been no notes taken." I remember an expression to the effect that Mr. Gaines said to you, "Mr. Duane, your client is certainly a sap and a sucker." I remember that [344] there was an expression that he was "just used." I remember that you told Mr. Gaines in my presence that I or Mr. Gaines or anybody else would select from the Alcohol Tax Unit any record we have, that Mr. Goldsmith would answer any question he wanted to propound to him, and that the records were open for him. I remember that somebody said to me that there were certain invoices that he would like to have. I remember that you agreed to get the records. I do not know whether or not you subsequently telephoned Mr. Gaines and told him that you had the records in your office. I knew that Mr. Johnson went to your office, but I do not

(Testimony of Edward C. Harkins.)

think he got any records. I am under the impression that he looked at your records, but I don't think he took any. He made an examination of them. I wouldn't say that Mr. Goldsmith at no time has refused to give me any document or information that I wanted; he hasn't refused on any documents. He told me that up until about July 1, 1943, Weiss had been a partner. I believe he described a deal, that he took over his interest and paid him, I believe, or I am under the impression that Goldsmith said he had paid all the money in the first place, and Weiss had paid him back, and then he had returned the money. I don't recall that Goldsmith told me, on this Rocking Chair transaction, that he had sold the whiskey for \$24.50 a case but he said he made \$2 a case. That was his profit and on that profit he gave Weiss \$1. That is exactly correct. The whiskey was billed at \$19.24, the freight is 81c and the State Excise Tax is \$1.92. I never determined when I deduct those figures from \$24.50, how much is left.

Cross-Examination

By Mr. Weiss:

You were in Mr. Colvin's office when I got there. I don't know whether I heard your first statement or not. I recall that you made a statement that a great injustice had been [345] done to you, and that that was why you came to him, to find out if something could be done to rectify it. I can't recollect exactly what was said. My impression is

(Testimony of Edward C. Harkins.)

that Mr. Colvin asked you if you were going to plead guilty. He might have said that if you had a lawyer he would advise you in front of your lawyer to plead guilty. I have considerable recollection of the conversation. I don't know whether you said to Mr. Colvin that had he brought you in as a witness you might be able to tell or remember whatever you know, but he is bringing you in as a conspirator to a charge to which you are not guilty; how does he expect you to plead guilty? I don't recall exactly those words. I don't recall him saying that you would be found guilty, anyway.

Mr. Weiss: Q. However, I said that I was there to find out if justice can be done in this particular case?

A. Yes, I remember that.

Q. And didn't you say to me that you were sort of sorry for me?

A. No, I said I felt rather sorry for Mr. Goldsmith, but I didn't understand how a man owning a business could know as little about his business as he professed to know.

Q. But I was there, I came there voluntarily at this office?

A. Yes, as far as I know.

Q. And I asked Mr. Colvin whether justice could be done in this particular case; that I was indicted, I told him that my wife brought a divorce action against me—do you remember that?

A. Yes, I recall that.

Q. On account of this indictment?

A. I recall.

(Testimony of Edward C. Harkins.)

Q. And that anything in the indictment would not be able to be proved? Do you remember that?

A. You might have made that. I don't recall your making that.

Q. You have sat in this trial and you have heard a man by the [346] name of—this indictment has charged me, Count 8, that on or about the 23d day of November, 1943, at the City and County of San Francisco, State of California, said defendant Samuel S. Weiss, sold to one Victor Figone 200 cases of Old Mr. Boston Rocking Chair whisky. Now, you remember Mr. Figone was on this stand?

A. Yes.

Q. And I looked at Mr. Figone and I asked him to pick out who was Mr. Weiss—

The Court: Now you are commencing to argue the case.

Mr. Weiss: I am sorry. I ask the Court to be reasonable in this matter.

The Court: You ask him any question you want, but try not to make an argument about it.

Mr. Weiss: Q. I was there at my own—I came to his office—

A. You were already there, Mr. Weiss, when I got there.

Q. And I asked if some method could be found where justice would be done to me, that I would be willing to submit if we can arrange some meeting, either with the judge or someone, to discuss this matter; is that correct?

A. Well, I don't recall that part of it. You made

(Testimony of Edward C. Harkins.)

a plea that justice could be done; I remember that.

Q. And he said he thought I should plead guilty.

A. My recollection was that he asked you if you were going to plead guilty, and then if you had an attorney he would advise the attorney.

Q. Advise me to plead guilty? A. Yes.

Thereupon the United States Attorney stated that the Government had no further witnesses to present and that he had some motions to make with regard to the evidence, both documentary and testimonial. Thereupon the Court excused the jury until the following Tuesday morning. Counsel for the Government then stated that he wished to make a motion to admit all of the evidence that had theretofore been admitted against all the defendants. In response to a question by the Court Counsel for each of the defendants stated that they opposed the motion. Thereupon Mr. Friedman on behalf of the defendant Feigenbaum objected to any testimony given by the witness Harkins being admitted in evidence against the defendant Feigenbaum upon the ground that the same were not statements, acts or declarations made in furtherance of the objection of the alleged conspiracy, but were acts and declarations done and said after the termination of the conspiracy, and merely the narrative of the past events.

Thereupon after argument on said objection an adjournment was taken until Monday, May 21, 1945, for motions and further argument, at which time,

in the absence of the jury the following proceedings were taken and had:

Mr. Colvin: Your Honor, for the sake of the record, I take it that the record will show that the Government does offer all evidence which has been admitted against any defendant as against all the defendants, and that further, the Government now makes an offer of all documents marked for identification to be admitted against all the defendants.

The Court: I take it that is the motion to be argued.

Mr. Friedman: That is the way I understood the record.

Mr. Colvin: I further move that the documents, 1 to 14, inclusive, I believe, which have been admitted against individual defendants be admitted as against all. [348]

Mr. Friedman: I understand that the motion, concretely, of the Government at this time is that all testimony and all documents, irrespective of how they came into the record up to this time, be now admitted against all defendants.

Mr. Colvin: That is the motion.

Mr. Friedman: That is my understanding.

The Court: Very well.

Mr. Friedman: To meet the Government's motion, your Honor, it is going to be necessary eventually to discuss some of these exhibits, testimony and proffered documents separately. But I discussed this with other counsel in the case and we feel that probably the best method to pursue at this time would be to call the Court's attention to various

principles of law that we feel are applicable to the offer made by the Government, and the manner in which these principles have been applied by our higher courts

(Argument by Mr. Friedman.)

Mr. Friedman: Bearing these general principles in mind, let us take up this Government's offer now piece by piece. First we come to the one I discussed last Friday, the testimony of Edward Harkins. We object—I say “we”—I mean the defendant Feigenbaum—we object to the admission of this testimony, which was admitted solely against the defendant Goldsmith, as testimony or evidence against the defendant Weiss, on the ground that it calls for a conversation had by Harkins with Goldsmith on two occasions, and testimony had by Harkins with Weiss and Goldsmith on one occasion, as I recall it, in which it is alleged that the defendants Goldsmith and Weiss made certain statements and declarations, all of which were as to past events.

(Argument.)

We object to the admission in evidence against the [349] defendant Feigenbaum of the testimony of Sander as to any conversations he had with Weiss, upon two grounds: First, that part of that conversation and alleged utterances by Weiss were narrative of past events, and upon the second ground that they are declarations of an alleged co-conspirator made out of the presence of Feigenbaum, that they are hearsay, that the corpus delicti of the conspiracy has not been established, and that there is no evidence to show that Feigenbaum was a

member of that conspiracy, and therefore the statements, acts and declarations of a co-conspirator made out of his presence cannot be admitted in evidence against him for any purpose.

(Argument.)

The defendant Feigenbaum objects to the admission in evidence against him of any of the testimony given by the witness Giometti on the ground that it is hearsay, that it calls for acts and declarations of third parties out of the presence of the defendant Feigenbaum, and even the acts and declarations of people that Feigenbaum never even knew or heard of, given at another time, and upon the further ground that the corpus delicti has not been established, and that therefore these matters cannot be competent evidence against Feigenbaum. And during the course of Mr. Giometti's testimony there was introduced for identification Government's Exhibit No. 24, which was an invoice, and Government's Exhibit No. 25, which, I think, was a freight bill, or waybill, of some kind or other. And we object to the admission of Government's Exhibits 24 and 25 in evidence against the defendant Feigenbaum, on the ground they are hearsay, proof of the conspiracy has not been established, that the connection of the defendant Feigenbaum with such conspiracy has not been established at all.

(Argument.)

First having objected in general to all the testimony of [350] Giometti, we now object to this specific portion of Giometti's testimony going into evidence against the defendant here upon the ground

that it is incompetent, irrelevant, and immaterial, that the corpus delicti of the offense has not been established, and it calls for acts and declarations between third persons made out of the presence of the defendant Feigenbaum, and there is no proof he was a member of any conspiracy, or that he authorized, had knowledge of, or ratified any such conversation or acts on the part of Abel.

So far as the testimony of Mr. Reinburg is concerned, we object to the admission in evidence against the defendant Feigenbaum of the testimony given by Mr. Reinburg upon the ground it is hearsay, upon the ground it calls for acts, transactions and events occurring out of the presence of the defendant Feigenbaum, that the corpus delicti of the offense has not been established, and there has been no evidence tending to establish the connection of Feigenbaum with any conspiracy charged or contained in the indictment filed herein, and that the testimony of Mr. Reinburg, so far as any acts, transactions or events he had with the defendant Abel are concerned, that the acts and statements and declarations of the defendant Abel are not binding upon the defendant Feigenbaum for the reasons I have stated.

(Argument.)

During the examination of Mr. Reinburg there was offered for identification Government's Exhibits 22, 23, 34, and 35, 22 and 23 being bills and invoices, 34 and 35 being checks, and we object to the admission of each of these exhibits in evidence as against the defendant Feigenbaum for each and all of the

reasons that we have urged against the admission of the testimony of the defendant Reinburg and the testimony of the defendant Giometti, and upon the further ground that the proper [351] foundation for none of these four documents has been established, and that there was no proof, first, as to the bills and invoices, that they were issued by the Francisco Distributing Company and, secondly, there was no proof that the checks written and given by Giometti and by Reinburg were ever received by the Francisco Distributing Company, or cashed by them. Again I confine, of course, the evidence as it appears against the defendant Feigenbaum.

(Argument.)

I object to the admission in evidence against Feigenbaum of any testimony given by the witness Figone on all the grounds I have heretofore urged as to the admission of some of the testimony, that it is hearsay, that the corpus delicti of the charge has not been established; there is no independent evidence to show that there was a conspiracy, or that Feigenbaum was a member thereof, other than testimony as to the acts and declarations of alleged co-conspirators; that the testimony as to all those transactions and events occurring out of the presence of the defendant Feigenbaum, they are not binding on him, there being no proof he authorized, sanctioned, or even had knowledge of such transactions.

(Argument.) [352]

The Court: Now that this issue has been presented, and it raises a serious question in my mind,

I think I would rather hear from the Government on this point and then you may continue afterwards.

Mr. Friedman: May I state this: In adopting your Honor's statement, I have not receded from my position that even though all this evidence was admitted, nevertheless it should not be admitted.

(Argument by Mr. Colvin.)

(Argument.)

Mr. Riordan: I make the same objection Mr. Friedman made on behalf of the defendant Blumenthal. I do not know whether Mr. Friedman intends to go down the list of witnesses, but if he does not, I want to put the general objection in to the admissibility of any and all documentary evidence other than that allowed in the course of the trial as against the defendant Blumenthal.

The Court: I was not intending to cut Mr. Friedman off from taking the matter up seriatim, but I just thought what we were concerned here with was the general big point, and if it was good, it was good as to each of these points seriatim.

Mr. Friedman: That is the way I understood it. If the necessity arises, I have a right to complete the record.

The Court: I do not think whether you narrated one, two, or a dozen of these particular bits of evidence it would make any difference in the result one way or the other.

Mr. Friedman: I was making specific objections to the particular bits of evidence.

The Court: You may make whatever you think you should make [353] for the record by way of

objection. It may be deemed you are going to point out all the specific items in evidence. I think that might be done without your mentioning them all. I do not know just what you had in mind.

Mr. Friedman: I am always a little bit scary about that, because every once in a while when we get up to the higher court, the court says, "Now, you have made a general objection, and if any part of that evidence was good, your general objection is bad." In other words, when you object generally to a whole line of testimony, if some part of it was admissible, your objection is bad. That is the thing that always scares me.

The Court: If you wish to make your own record you may do so.

Mr. Friedman: I intended to.

The Court: I do not think you need make an argument, but if you wish to point out the specific items of evidence for the sake of the record I do not want to deter you.

Mr. Friedman: That is the way I understood, your Honor.

Mr. Riordan: That is the way I understood it.

The Court: How about the defendant Weiss? Can you add anything to what the lawyers have said in this matter?

Mr. Weiss: I do not know whether I should follow Mr. Friedman's arguments in this case, or follow Mr. Dunne's arguments.

The Court: You can adopt both of them.

Mr. Weiss: If the Court will give me permission, I will adopt both of them at this time. How-

ever, I would like to state for the record that the only person who has testified in this case that I sold him 200 cases of Old Mr. Boston Rocking Chair Whisky was a man by the name of Victor Figone. Now, may the record show that that man testified also I assume before the grand jury that I sold him 200 cases of [354] Old Mr. Boston Rocking Chair Whisky on or about the 23rd day of December, 1943. May the record show that on cross-examination Mr. Figone was asked by Mr. Weiss, Does he see Mr. Weiss or recognize Mr. Weiss in the courtroom, and Mr. Figone said, "No." He has looked around and he doesn't recognize Mr. Weiss. That is all.

The Court: I want to say to you, gentlemen, that the principles of law with respect to conspiracy are pretty well settled. I have had them called to my attention a number of times, and made several of these decisions, many of them, in fact. After all, the precise question that the Court has is whether or not this motion of the Government, under the particular circumstances of this case, should be granted or not. And that depends wholly upon what the circumstances and facts of the case are, set into the background of the body of the law that we have, that you, gentlemen, have discoursed upon. Of course, every case is a little different from every other case. After hearing the arguments and having the record reviewed here, I feel now that the Government's motion should be granted. I think that the facts of the case, all the evidence taken together now is sufficient to show that all the evi-

dence should be admitted, all the exhibits should be admitted against all the defendants, with the exception that I think the testimony that was given by the last witness is admissible against the defendant Goldsmith, but I do not think it should be admitted against the other defendants in the case. It is in the nature of an admission and I do not think it should bind the other defendants.

Mr. Dunne: Your Honor, may I interrupt for the sake of keeping the record straight on that? You will recall that the testimony of the last witness was as to certain conversations with Goldsmith and certain conversations with Weiss. Under [355] your Honor's ruling, you would not permit the conversations with Weiss as against Goldsmith.

The Court: You are right about that. I am glad you called my attention to that. That testimony should be admitted against Goldsmith which pertained to Goldsmith, and against Weiss that testimony which pertained to Weiss.

Mr. Colvin: Then the particular phases of the conversation in which both participated would be admitted as to both.

Mr. Dunne: That is right.

Mr. Colvin: We would have to specify, I suppose, on that.

The Court: That will be the order of the Court, and in order that you may have your record clear, Mr. Friedman, I want you to state any exceptions or objections you have not thus far stated.

Mr. Friedman: I would like to, if I could do it as briefly as possible: I would like to finish out my

specific objections, bearing in mind what your Honor's intention was, and I will ask your Honor to set the ruling aside until I finish my argument. Otherwise I would have to move to strike it out.

The Court: I think the record is sufficiently clear on that, isn't it, that you may be deemed to have made the specific objections which you are now making prior to the granting of the Court's order, or I can set it aside.

Mr. Friedman: The same thing. They get pretty technical on that.

The Court: What we have said is sufficient to show you are making your record on it. Take your objections, and, if necessary, I will reaffirm the order or change it. You may convince me otherwise.

Mr. Friedman: I think this morning I objected to the Reinburg and Giometti testimony, to the Figone and the Avila testimony, as I recall it, and Exhibits Nos. 26 and 27, [356] the check and invoice that were admitted on Figone's testimony. As to Figone, Avila, and these two exhibits, of course, Feigenbaum objects to their admission in evidence against him on all the grounds previously stated, and on the ground they are hearsay as to him; no foundation has been laid for the check or invoice establishing who actually received and deposited the check or who made the invoice; and that the corpus delicti has not been established, there being no proof that Feigenbaum was a member of any conspiracy; and there being no proof of any conspiracy, at all.

As to the witness James Cermusco, upon whose

testimony there were marked for identification Exhibits 27, 28, 29, 30, 31, 32, and 33, I object to the introduction against the defendant Feigenbaum of Cermusco's testimony on the ground it is hearsay, the corpus delicti has not been established, it calls for acts, declarations and events by a third person out of the presence of Feigenbaum. It is not binding upon him, and I object to the admission in evidence of Exhibits 28 to 33, inclusive, upon the same grounds, and likewise upon the ground that no foundation has been laid for such checks, in that there was no proof as to who received or cashed them. There is no proof as to who issued the invoices.

Upon the same grounds I move to strike out the testimony of Vukota and Lewis, on the ground it is hearsay twice removed. These men, the testimony shows, only dealt with Cermusco. They never saw anybody named as a defendant in this case and, as I recall it, anybody connected with the Francisco Company. Their acts, statements and declarations are hearsay as to Feigenbaum, acts and declarations out of his presence, over which he had no control; the corpus delicti of the offense charged has not been established, and that there has been no independent proof identifying Feigenbaum with the conspiracy [357] charged.

The next set of witnesses—and I can deal with them jointly—are Henry L. Taylor, Ruth Taylor, and Raymond C. Humes. This testimony was admitted as to Feigenbaum, and at this time I am going to move to strike it out on the following

grounds, to wit, that such testimony of these three witnesses, all dealing with the same event, is entirely immaterial and incompetent, for the reason that the corpus delicti of the offense has not been established, and upon the further ground that all this showing was an independent, isolated transaction wherein Mr. Feigenbaum agreed to act as the agent for Mr. Taylor and Mr. Hume for the purchase for these people of 200 cases of whisky, and that that was the agreement between the parties, and there was no agreement between Feigenbaum and either Taylor or Humes, or both of them, that Feigenbaum was to sell to either of these parties any whisky.

On like grounds I move to strike out U. S. Exhibit 34, the check for \$4900, testified to as having been written by Mrs. Taylor and delivered to Feigenbaum, and United States Exhibit No. 35, the invoice that was involved in that transaction.

I object to the admission in evidence of the testimony of Walter G. Vogel, together with U. S. Exhibits 45 and 46, which were introduced and marked for identification upon his examination. You will recall that Vogel testified that some strange and unidentified man came into his place and offered to sell him whisky at \$24.50 a case for the Distributing Company, demanding a brokerage for all over that amount. There is absolutely no evidence that this man Vogel knew anybody connected with the charge in this indictment whatsoever, and Vogel's testimony relates to an incident clearly res inter alios acta, hearsay as to the defendant Feigenbaum, the proof [358] of the corpus delicti of

the offense has not been established, and it calls for acts and transactions out of the presence of Feigenbaum, without any evidence to show that he knew, sanctioned, approved or ratified or authorized such transaction, and that goes to the two exhibits 45 to 46, as well as to Vogel's testimony.

I likewise object to the introduction in evidence against Feigenbaum of the testimony of Francis Duffy, together with United States Exhibits 47, 48, and 49, consisting of two checks and an invoice that were marked for identification upon Duffy's examination. The testimony shows that Duffy, who operates a tavern—a man came in, whom he couldn't identify, as I recall it; that he bought from this man 100 cases of whisky at \$24.50 and paid the man a premium of \$20 a case, gave him a check for \$2000, a check for \$2450. The invoice came in, the name of the payee on this check was left in blank, filled in by the man after he went away. The testimony of Duffy is wholly incompetent, absolutely hearsay, *res inter alios acta*, calls for transactions and events out of the presence of the witness Feigenbaum, which he is not shown to have sanctioned, ratified or confirmed, authorized, or approved in any way; that the *corpus delicti* of the charge of the indictment has not been established, or any evidence to show that he was a member of any conspiracy.

I object to the introduction in evidence of the testimony of Angelo Lombardi, together with U. S. Exhibits 50 and 51, which consist of a check written by Lombardi to a man named Minkler, and an invoice. Lombardi testified that in Santa Rosa he

bought 100 cases and gave some cash to Mr. Blumenthal for it. Minkler contacted him about the whiskey. He went to San Francisco and talked to some man there, and so forth. That later on, on the 20th of December, he came to the Sportorium with [359] Minkler. He went into a back room and paid Blumenthal some money. I will object to this testimony, the check, and the invoice, upon the grounds I have heretofore stated, that the matter is purely *res inter alios acta*, is not binding on the defendant Feigenbaum, calls for acts, transactions and events out of his presence, over which he has no control, and they are not binding on him; the *corpus delicti* has not been established, and in this case, as in the others, it calls for the acts and declarations of a co-conspirator made out of the presence of Mr. Feigenbaum, and it is inadmissible, as these other matters are inadmissible for any purpose until the *corpus delicti* has been established by independent testimony. On the same grounds, I object to the introduction in evidence of the testimony given by Herman Fingerhut, together with exhibits 53, 54, 55, 56, and 57, introduced upon his examination. Fingerhut owned a cafe in Vallejo. He said on December 3rd and 4th he saw Blumenthal, bought 200 cases of whiskey at \$55; that later he and Mr. Travis went to the Sportorium and had another deal with Blumenthal.

I object to the testimony of this witness upon all the grounds I have heretofore stated. It calls for the declaration and conduct of an alleged co-conspirator, Blumenthal, out of the presence of

the defendant Feigenbaum, and without any independent proof of the corpus delicti or of Feigenbaum's connection with the alleged conspiracy; upon the further ground it is hearsay, not binding on the defendant Feigenbaum; it constitutes acts that were done without his knowledge, consent, ratification or approval.

I object to the introduction in evidence of the testimony of Walter Travis, together with Government's Exhibits 58, 59 and 60; consisting of two invoices and a freight bill. The testimony of Walter Travis was the same as that of Fingerhut, [360] except that in the first deal Fingerhut took 100 and Travis took 100, and in the second hundred, 75 were for Travis and 25 for Fingerhut.

I object to the introduction of this testimony and the three exhibits I have designated, upon all the grounds I have objected to the testimony of Fingerhut and the checks and invoices involved in Fingerhut's testimony.

I object to the testimony as against the defendant Feigenbaum, of the testimony given by the witness A. P. Jones. Mr. Jones, as I recall, testified to certain Alcohol Tax Unit forms 52-A and 52-B, which were marked Government's Exhibit No. 2 and Government's Exhibit No. 3, and Government's Exhibits 4, 5 and 6. These forms were introduced for the purpose of showing the purchase or lack of purchase of certain whisky by the Francisco Distributing Company during certain months. I object to those forms being in evidence against Feigenbaum, on the ground they are *res inter alios acta*. They

constitute hearsay as to him. No proper foundation has been laid as to any of these forms, and there is no proof they were executed by any alleged conspirator in this case; that they are hearsay as to Feigenbaum, and that they cannot be considered for any purpose in determining his guilt or innocence.

I object to the introduction in evidence against Feigenbaum of the testimony given by the witness Robert Grubbs. Robert Grubbs was connected in some way with the Santa Fe Railway, and he testified to Government's Exhibits 7 and 8, and I object to the introduction of such exhibits in evidence, consisting of two freight bills for two carloads of whisky, on the ground the matter is purely hearsay as to the defendant Feigenbaum. They are acts, transactions and events out of his knowledge, presence or hearing. It is not shown he knew of, ratified, confirmed, authorized or approved, and these matters [361] are wholly incompetent to be considered in determining the guilt or innocence of the defendant Feigenbaum.

~~I likewise move to strike out the testimony of~~ Fred A. Sander, or, rather, I object to the admission of the testimony of Fred A. Sander in evidence against the defendant Feigenbaum, together with United States Exhibits 9, 10, 11 and 12, which were introduced and marked upon the examination of this witness, upon the ground that the testimony of Mr. Sander, who was connected with the San Francisco Warehouse and executed two warehouse receipts, and testified as to certain instructions as

to the disposal of the contents of the cars which he said were represented by these receipts supposed to have been given to him by the defendant Weiss. I object to all the testimony and all these exhibits I have enumerated, upon the grounds that as to the defendant Feigenbaum it is wholly incompetent, irrelevant, and immaterial and hearsay as to him, not binding upon him; that there has been no proof of the corpus delicti or the defendant's connection with any conspiracy, or the conspiracy set forth in the indictment. These matters are merely res inter alios acta, and I object to their admission. Additionally, I object to the admission of that portion of Mr. Sander's testimony which has to do with conversations he said he had with the defendant Weiss on December 15th and on December 17th, relative to delivery orders, invoices, and what was to be done with these two cars of whisky, upon the grounds that that evidence constitutes the acts, declarations and statements of an alleged co-conspirator, made out of the presence of the defendant Feigenbaum, and there being no proof of the corpus delicti, the same as that binding on the defendant Feigenbaum.

I likewise object to the introduction in evidence against the defendant Feigenbaum of United States Exhibits 13 and 14, which have to do with certain invoices of a carload of whisky [362] out of a B & O Railroad car, upon all the grounds I have objected to the other portions of the admission of the other railway receipts and instructions, as testified to by Sander under the prior exhibits;

and additionally, I object to the admission against Feigenbaum of the testimony of the witness Sander relative to a conversation he said that he had with Weiss on January 3, 1944, in which the invoices were received by Weiss, and in which Weiss told him to do something about the delivery, on the ground that the testimony as to the acts and declarations of an alleged co-conspirator is inadmissible and not binding upon Feigenbaum, and there has been no independent proof of the corpus delicti of the offense, or Feigenbaum's connection with any alleged conspiracy.

I object to the admission in evidence against the defendant Feigenbaum of the testimony of the witness Frank Dito, of the Bank of America, and likewise the admission in evidence against the defendant Feigenbaum of United States Exhibits 16, 17, 18, 36, 37, 38, 39, 40, 41, 42, 43, 44 and 45. I object to all these matters in the testimony of Dito upon the ground they all have to do with the bank account and the affairs of the Francisco Distributing Company. They are matters and things of which the defendant Feigenbaum is not shown to have had any knowledge, any control over, acts and things done out of his presence, hearsay as to him, and that in every instance no foundation has been laid for the introduction of any of these documents, checks or statements that were introduced under Dito's testimony, for the reason that there has been no preliminary proof as to the endorsers or depositors, and so forth, of the account. And that includes the so-called signature card, which is supposed to

have been the one with which the account was opened for the Francisco Distributing Company in the name of Goldsmith and Weiss. I object to that, which [363] is Government's No. 15, particularly upon all the grounds I have heretofore stated in discussing the exhibits admitted under the testimony of Frank Dito and upon the further ground that no foundation for the signature card has been presented so far as the defendant Feigenbaum is concerned, and there is no proof that either Goldsmith or Weiss signed or executed the same.

I move that there be excluded, and if it has been admitted, that there be stricken out, so far as the testimony of the Witness Joseph Nathanson is concerned, any computation of the figures he has given so far as the so-called ceiling price under the Emergency Price Control Act of whisky is concerned, on the ground it is not the subject of expert testimony. I think I have covered them all.

The Court: The various motions to strike will be denied and exceptions noted. The Court will adhere to its ruling that the evidence and the exhibits will be admitted against all the defendants, save in the case of the testimony of the last witness, Mr. Harkins, whose testimony will be admitted as it relates to conversations with the defendant Goldsmith as to him, and with respect to conversations with the defendant Weiss as to him, Mr. Weiss, and with respect to both of them, where the conversations were had with both of them.

Mr. Friedman: Our exceptions to each ruling are noted.

The Court: Each counsel will have his exceptions.

Mr. Riordan: Do I understand that motion is made on behalf now of all the defendants?

The Court: Oh yes. Let the record show that the specific exceptions that Mr. Friedman has taken with respect to his client made with respect to all the exhibits and testimony [364] are deemed to have been taken by each of the defendants' counsels in like manner and exceptions noted on behalf of each.

Mr. Dunne: Your Honor, we should add to them in some instances with respect to the defendant Goldsmith, with regard to the conversations with the last witness, and we want to state these as objections where the evidence has not gone in, and motions to strike it out where it has gone in, that the testimony is incompetent, irrelevant, and immaterial. The testimony of the extrajudicial statements not part of the *res gestae* of a defendant and an alleged party to the conspiracy is not admissible prior to independent proof as to him of the existence of the conspiracy and the *corpus delicti*. As to the documents, there was no evidence, aside from such extrajudicial statements that brings home to the defendant Goldsmith any knowledge, information or proof that he had any connection with any documents, bank accounts, or anything else, except such extrajudicial statements of the witness Harkins, and accordingly as to him there was no showing of a connection between him

and what purported to be the documents of the San Francisco Distributing Company.

I want to add certain objections to those stated by Mr. Friedman as to Government's Exhibits 2, 3, 4, 5 and 6. There is no identification as to the forms 52-A and 52-B. It is not shown by whom they were made. It appears that they were some place in the files of the witness Jones, or in the files over which he had charge, but there is no showing by any proof of any sort that they were made in the ordinary course of business, no foundation laid for their admission as a record made in the ordinary course of business.

The same goes as to 7 and 8, the freight bills.

Now, without repeating in detail, I do not think [365]—Mr. Friedman can correct me as to this—I do not believe Mr. Friedman made objections to those conversations which were had and the documents introduced in connection with the transactions that were with Mr. Feigenbaum, did you?

Mr. Friedman: Oh, yes, I did.

The Court: He made a motion to strike those.

Mr. Friedman: I made a motion to strike those, because those had already been admitted as against Feigenbaum.

Mr. Dunne: Because, of course, as to things that happened in Feigenbaum's own presence, our position as to things that happened in his presence is Mr. Friedman's position with respect to Feigenbaum as to what happened in Abel's presence, Blumenthal's presence, and so forth. So we want the record to show that as to each item of

evidence in connection with the transactions allegedly participated in by the defendant Feigenbaum, our objection goes that it is incompetent, irrelevant, and immaterial, hearsay, *res inter alios acta*, without foundation, no proof of the corpus delicti, and no independent proof of the connection of any defendant with any alleged conspiracy of which Feigenbaum, or any other party with whom Feigenbaum dealt, was a party.

The Court: The record will also show each of the other defendants has made the same motion, made the same objections with respect to the evidence pertaining to the defendant Feigenbaum.

Mr. Riordan: That is right.

The Court: So the record will be clear on that.

Mr. Dunne: Exception noted as to that.

The Court: Exception noted.

Mr. Dunne: I particularly want to call attention to this fact, and I think I am correct in this, that as to the testimony of Figone and Avila, they had to do with an unknown individual. [366]

The Court: Well——

Mr. Dunne: I think the same thing is true of Cermusco. He could not identify anybody. Figone said he dealt with Weiss, but he did not identify Weiss.

The Court: He conducted his transaction with Cermusco.

Mr. Dunne: Cermusco, an unidentified person, and likewise Vogel. My recollection of the record is that as to those, they were admitted limited to the defendant Goldsmith, so that in respect to those

matters particularly we want our position to be clear, and that is in the nature of a motion to strike out.

The Court: I am glad you called my attention to that. It may be the testimony of those two witnesses should be limited to Goldsmith.

Mr. Dunne: There is no more connection between those men, Vogel, for instance, who talked to Goldsmith, than those who talked to Figone.

The Court: He got the invoice and made the money on that part of the transactions. That, generally, was the way in which the transactions were handled. I think it is admissible against Goldsmith. What is the position of the Government with respect to the testimony of Vogel and Duffy?

Mr. Colvin: Vogel and Duffy—Figone is in a different position, I think. Figone is the man who went to the Francisco Company.

The Court: I am referring to the testimony of Duffy and Vogel, who testified an unidentified man came to their respective places of business and conducted the transactions with them. Is it the position of the Government that their testimony is admissible against all the defendants? [367]

Mr. Colvin: Yes, we take that position at this time, your Honor.

The Court: I think the Court will modify its order to provide that the testimony of these two witnesses will be admitted only as against the defendant Goldsmith.

Mr. Friedman: Upon that ruling, how about Cernusco's testimony?

The Court: That was a little different.

Mr. Friedman: He did not deal with anybody. Some independent, unidentified man came in Cermusco's place of business, talked with Vukota and Lewis, and then he bought some whisky for Vukota and Lewis. That is all the testimony of Cermusco, Vukota and Lewis. It falls identically within the same category as Duffy and Vogel.

The Court: What is the basis for your contention, the Government's contention that the testimony of the two witnesses I have already mentioned, Vogel and Duffy, is admissible against all the defendants in this case? What is the purpose of that? What does that show?

Mr. Colvin: It bears, your Honor, on the question of the identification of the man with whom they dealt. However, the Government's position would be that the circumstances under which they dealt would indicate that their dealings were part and parcel of the same conspiracy that these others were in.

The Court: You mean these men were unknown participants in the conspiracy?

Mr. Colvin: Yes, your Honor, that the particular individuals with whom they dealt were unknown. We concede we have not identified them. But the circumstances of their participation were such that they must have dealt in these two cars as the others did. That is the Government's position [368] on that. We do not feel that the identification of the individuals with whom they dealt is a necessity to that.

The Court: Do you know of any authority that supports that, that in support of an indictment charging conspiracy of certain defendants with unknown persons you could offer in evidence a transaction by an unknown person with a third party, and that that is admissible in the charge set forth in the indictment?

Mr. Colvin: I have no authority on that at this time, your Honor. But it seems to me the point is the fact that they are unidentified is not a qualification; so long as the sales, themselves, were part of this scheme. That is the point—not the fact that they were unidentified. The same details are present which go to the nature of the transactions. The situation at this time is only the individual with whom they dealt it not identified. But if it is part of the same transaction, it is part of the same conspiracy.

Mr. Friedman: Assuming there is a conspiracy.

Mr. Colvin: Yes.

(Discussion between court and counsel.)

The Court: I think I am going to take under advisement the motion with respect to those three witnesses.

Mr. Colvin: That is Vogel, Cermusco, Avila and Duffy? I take it Avila would be in the same category, since Avila's testimony—

Mr. Friedman: And Avila.

Mr. Colvin: I think there is more in the case of Avila.

Mr. Dunne: As to Goldsmith, there is one thing I want to make sure the record is clear on here:

It appearing that the basic permit was in his name, and it appearing that certain transactions were purportedly made under the name of [369] Francisco Distributing Company, we want to object to those as to him upon the ground there is no foundation, because none of those have been brought home to him, either by proof that they were made in the ordinary course of business, or in any other way, to make them admissible as such, that he made them or he had knowledge that they were made, or he had any knowledge whatsoever about them.

I do not know whether Mr. Friedman covered this or not, but we have an objection on the ground it is also *res inter alios acta* and without foundation as to the alleged certificate of doing business under the fictitious name of Francisco.

Mr. Friedman: I covered that Friday.

Mr. Dunne: I think otherwise it is understandable in this record. As I understand the ruling, the purpose of all of this is to present to your Honor the grounds of the objections so your Honor will know what we are talking about.

The Court: Between all of you you have done that.

Mr. Dunne: I think we have done that, and I do not think we are called upon again to go over *seriatim* each item of evidence. But we want our objections and the grounds to appear severally to each document, each item of evidence, each act, an deach transaction as to each defendant.

The Court: Do you gentlemen have any other motions to make?

Mr. Riordan: I was going to ask, so far as I was concerned—but I do not intend to make any extended argument, to say a few words the first thing in the morning. I will just state my motions briefly for a directed verdict. [370]

Mr. Weiss: Your Honor, may the record show that the objections made by Mr. Dunne as to Goldsmith are being made also as to myself, regarding the testimony of Mr. Harkins and all other witnesses?

The Court: I will state for the record for you that you may have the benefit of any of the objections that are made by any of the counsel in connection with this matter that pertain to your particular case, and that you may have an exception to any of the rulings of the Court that pertain to your case.

Thereupon, an adjournment was taken until Tuesday, May 22, 1945, at 10:00 o'clock a.m., at which time the jury being present, the following proceedings occurred:

The Court: Then the Court will state for the benefit of the jury that the Court has granted a motion of the Government to admit all the testimony heretofore offered against all the defendants, with the following exception: [371]

That the testimony of the last witness, Mr. Harkins, is admitted in evidence as against the defendant Goldsmith as to the conversation had by the witness with the defendant Goldsmith; that his testimony is admitted as to the defendant Weiss with respect to conversations with the defendant Weiss;

and as to both defendants, Goldsmith and Weiss, as to all conversations at which both defendants, Goldsmith and Weiss, were present, and exceptions are noted as to this ruling on behalf of all the defendants separately.

Mr. Riordan: And as to this last statement of your Honor's relative to the Harkins testimony, I am given to understand that is limited and does not affect the defendants Blumenthal and the other two or three?

The Court: That is right.

Mr. Friedman: Your Honor, we have several additional motions to make at this time.

The Court: Do you wish the jury excused?

Mr. Friedman: I would suggest that.

The Court: Ladies and gentlemen, there are one or two matters counsel wish to take up in the absence of the jury. The jury may be in brief recess at this time. Bear in mind the admonition of the court.

(The jury was excused from the courtroom and the following proceedings were had in the absence of the jury.)

Mr. Friedman: During the course of the argument yesterday your Honor asked Mr. Colvin whether or not in these transactions where an unknown intermediary was concerned, whether or not he considered this unknown intermediary was on the same footing with the defendants in this case, that is, on the same footing as a conspirator, an agent for the conspirators. He answered yes. While we were objecting to the admission of that testimony on

other grounds yesterday, for the purpose [372] of completing my record I move the Court to strike out, so far as the defendant Feigenbaum is concerned all the testimony given by the witness Victor Figone and by the witness Melvin Avila, together with United States Exhibits 26 and 27, a check and an invoice, on the grounds which we urged against the admission of this testimony originally, and upon the further ground that this testimony constitutes simply the extrajudicial statements and acts and declarations of an alleged co-conspirator said and done out of the presence of the defendant Feigenbaum, and without any proof of his knowledge, authorization or consent to such statements or transactions.

The Court: Inasmuch as I have granted the motion to apply the testimony of these witnesses, as well as all the testimony, as against all the defendants, I will deny this motion. You may have an exception. Do the other defendants wish to join in this motion?

Mr. Dunne: Yes, your Honor.

Mr. Riordan: Yes, your Honor.

Mr. Wolff: Yes, your Honor.

Mr. Weiss: Yes, your Honor.

The Court: It may be so deemed and an exception noted.

Mr. Friedman: I might state in doing this they were not grounds I urged at that time. I will likewise on the same grounds and for the same reasons move that the testimony of the witness James Cermusco, John Vukota, and V. M. Lewis be stricken.

in so far as the defendant Feigenbaum is concerned, upon all the grounds urged against the admission of such testimony, and upon the further grounds that the testimony of these three witnesses merely concern the extrajudicial statements and acts of an alleged co-conspirator, said and done out of the presence of the defendant Feigenbaum, and without [373] any proof of his authorization, knowledge, or consent. That refers to the testimony, together with Government's Exhibits 28, 29, 30, 31, 32, and 33, introduced under such testimony.

The Court: The other defendants join in that motion?

Mr. Dunne: We join in that motion.

Mr. Riordan: Yes, your Honor.

Mr. Wolff: Yes, your Honor.

Mr. Weiss: Yes, your Honor.

The Court: The motion will be denied and exceptions noted for all the defendants.

Mr. Friedman: I likewise move to strike out the testimony of Walter Vogel and United States Exhibits 45 and 46 upon all the grounds heretofore urged as to the admission of such testimony, and upon the further ground that it is merely testimony relating to an extrajudicial act and declaration of a co-conspirator said and done out of the presence of the defendant, and without any proof of his authorization, knowledge or consent thereto.

The Court: Do the defendants join in this motion?

Mr. Dunne: Yes, your Honor.

(The other defendants indicated their assent.)

The Court: The motion will be denied and exceptions noted for all the defendants.

Mr. Friedman: As to the witness Francis Duffy and exhibits 47, 48 and 49, I move that this testimony and these exhibits be stricken out upon all the grounds that I urged for the striking out of the testimony and exhibits given under the testimony of Walter Vogel.

The Court: The same ruling and the same exceptions noted.

Mr. Friedman: Now, if it please the Court, the defendant Feigenbaum at the close of the Government's case in [374] chief now moves the court to instruct and direct the jury to find and return a verdict finding the defendant Feigenbaum not guilty upon each and all of the following grounds, to wit:

1. That the evidence introduced by the Government is insufficient to support either a verdict or a judgment of guilty as to the defendant Feigenbaum.

2. That the offense sought to be charged in the indictment has not been proved by the Government.

3. That the evidence adduced fails and is insufficient to prove the alleged conspiracy set forth in the indictment.

4. That the evidence adduced fails and is insufficient to prove that the defendant Feigenbaum was a member of or identified with the conspiracy sought to be charged in the indictment.

5. That the evidence adduced by the Government does not exclude every other hypothesis except that

of guilt, so far as the defendant Feigenbaum is concerned, and that such evidence is as consistent with his innocence as it is with his guilt.

6. That the only evidence tending to establish the conspiracy charged and Feigenbaum's connection therewith, consists of extrajudicial acts and declarations of alleged co-conspirators, said acts and declarations having been done and made out of the presence and without the knowledge, authorization or consent of the defendant Feigenbaum.

The Court: I have given the same consideration to the motions to adopt all the evidence as I would to this motion. I feel that there is sufficient evidence in this case to have its weight passed upon by the jury. I will deny the motion and allow an exception.

(Argument.) [375]

The Court: I am satisfied that there are sufficient facts in this case in the acts of the defendants, themselves, to show a furtherance, prima facie, of an unlawful design or purpose, and that is why I am denying the motion for a directed verdict at this time.

Mr. Friedman: We note an exception.

The Court: You may have an exception.

Mr. Dunne: If your Honor please, on behalf of the defendant Goldsmith and as to him, I wish to adopt the grounds just stated by Mr. Friedman on behalf of the defendant Feigenbaum, and I likewise, because to some extent the point is the same, desire to adopt the ground urged against the Gov-

ernment's motion for the admission of all this evidence.

So that we won't be too general about it, and so that we shall be within the rule, we should like to state and invoke a ruling upon the motions for the defendant Goldsmith as follows:

The Government has failed to make a case. There has been no evidence against him. There has been a complete failure to prove the charge made in the indictment.

More specifically, there is no direct evidence of any conspiracy or, on the part of the defendant Goldsmith, any knowledge of or participation or act in aid of any alleged conspiracy. That if it can be said there is room for any inference from indirect evidence or circumstantial evidence, if there is any, such evidence is as equally consistent with honesty and legal dealings as with illegality or with the charge made in the complaint, and such evidence, indirect evidence, does not exclude every other reasonable hypothesis and does not exclude or tend to exclude the hypothesis of innocence on the part of the defendant Goldsmith.* So much for the matter generally: [376]

The only thing that has been proved is a series of isolated transactions; that there has been proved no connection between any of them, or any possible connection between them. That is shown only by the extrajudicial statements made by co-conspirators out of the presence and without the knowledge of the defendant Goldsmith.

There is nothing in the evidence in any way to

connect the defendant Goldsmith with any of the transactions, except the direction to the bank to pay certain sight drafts; that anything that was done here or with any documentary evidence, first, even with the testimony of the witness Harkins, upon the ground as to him there is no independent proof of the corpus delicti. There is no independent proof as to the defendant Goldsmith. And to submit the case to the jury upon that testimony would be to submit it and secure a finding solely on the extrajudicial statements of an alleged co-conspirator after the termination of the alleged conspiracy, and in the nature only of an admission and reservation of a past history, and without any other foundation for the testimony of the witness Harkins; there is no connection, whatsoever, in any form.

That there has been no proof of any conspiracy whatsoever, whether joined in by the defendant Goldsmith, or not, except by hearsay testimony, and that as to him there has been no proof, no proof beyond a reasonable doubt, and at this point there has been no proof to overcome the presumption of innocence, and that on the whole the Government has failed to make out a case.

The Court: Very well. The same ruling. Exception.

Mr. Riordan: If your Honor please, I would like to adopt for the defendant Blumenthal the particular motions [377] just made by Counsel Friedman and Counsel Dunne, substituting therefor also instead of the particular witnesses named with respect to extrajudicial statements the failure to estab-

lish the corpus delicti evidence to apply to the witnesses Lombardi, Fingerhut and Travis. I do that in that manner to save the time in repeating those motions, and therefore I adopt all of the motions heretofore made. And I would like to, for the defendant Blumenthal, add the following motions:

In behalf of him I make a motion for a directed verdict for the defendant Blumenthal on the grounds that the said indictment does not state facts sufficient to constitute a crime or offense against the United States of America.

Second, that the Maximum Price Regulations 193 and 445, which the said indictment charged that this defendant, namely, Blumenthal, conspired to violate, are and each of said regulation is so indefinite, not certain, that it is impossible to determine what is meant thereby, or what acts are prohibited thereby, and in part it is impossible to ascertain what price it was lawful at the time mentioned in the said indictment to sell the whiskey at referred to in the said indictment, and by reason of which the said regulations are void; that a conviction under the said indictment would be a violation of the Fifth Amendment of the Constitution of the United States in that no person shall be deprived of life or property without due process of law, and that this Honorable Court, I am respectfully, has no jurisdiction to hear this cause or put the defendant to trial on the indictment.

Second, that the regulation 445, which under its terms, at a date subsequent to the transactions involved in this indictment relative to Rocking Chair

Whiskey, namely, the dates of December and January, 1944, was not passed and in effect until May of 1944, and that it is an attempt upon the [378] part of the Administrator and those adopting the regulations to create an *ex post facto* law.

I further want to make the point, if your Honor please, without arguing it, at least at this time, that the provisions under this special act, out of which these regulations 193 and 445 are created, and the general act itself, the so-called Office of Price Administration Act, has all of the elements in it that allow a transaction of this nature, and that no other act or law of the United States, whether it be civil or criminal, other than the exceptions contained in that act, can be used.

I particularly call that to your Honor's attention because I intend to stand seriously by the point that under the general act there is a provision which sets forth that no violations of the Price Administration can be had by any parties by agreement or otherwise—I am using the general language in there—but an agreement is a conspiracy or a synonym. The lawmakers then go on to set up a structure between Federal officials who can be charged and convicted for a felony. All other persons in the United States can only be convicted of a misdemeanor. And then the act goes on to provide in the third section that any act inconsistent with this General OPA Act shall have no force and effect. And while normally at first glance that might seem very peculiar, that you could toll the famous conspiracy statute, the specialty acts of this nature for a period of time, the

last twenty or thirty years at least, have been laying distinct lines of charges and punishments where they put teeth into those so-called acts, and while it has never been before the higher courts, at this time I raise that point very seriously before your Honor.

(Argument.) [379]

The Court: I will deny that motion and you may have an exception.

Mr. Riordan: Exception.

Mr. Wolff: If your Honor please, on behalf of the defendant Lewis Abel, we desire to make a motion for a directed verdict and also a motion to dismiss the indictment on behalf of the defendant Abel on all the grounds stated by Mr. Friedman, Mr. Dunne and Mr. Riordan, and I move the Court for a directed verdict and a dismissal of the indictment on the following grounds in addition to those already indicated:

The Court: Mr. Wolff, will you kindly speak a little more clearly and slowly? Both Mr. Friedman and I think to some extent Mr. Riordan and Mr. Dunne, as well as yourself, have talked pretty rapidly and the reporter is having a kind of hard time of it.

Mr. Wolff: I would be perfectly willing, your Honor, to indicate this to you, so you will have it, and then hand this copy to the reporter.

The Court: You make the statement, and I think maybe you had better slow up.

Mr. Wolff: I apologize. The indictment fails to state facts sufficient to constitute a violation of Title 18 of the United States Code, section 88 or any

other law or statute of the United States on the part of the defendant Abel.

2. The evidence adduced is insufficient to justify a verdict of guilty against the defendant Lewis Abel.

3. That the evidence adduced fails to show that said defendant committed the alleged violation attempted to be set forth in the indictment, or any violation of said statute or law of the United States.

4. That the evidence adduced does not show that the said defendant conspired with any of the other defendants, [380] or any other persons or person to unlawfully sell at wholesale certain distilled spirits, to wit, Old Mr. Boston Rocking Chair Whisky in excess of a higher than the maximum prices established by law, to wit, \$25.27 per case in violation of section 902(a), 904(a) and 925(b), Title 15, U. S. Code, APS, Office of Price Administration Regulations, Maximum Price Regulation 1943 and Maximum Price Regulation 445, and we ask your Honor for an order so directing the jury.

The Court: The same ruling and the same exception.

Mr. Riordan: The defendant Blumenthal desires to adopt counsel's objections, too, if your Honor please, and avail ourselves of any of those objections.

Mr. Dunne: The defendant Goldsmith adopts the grounds stated by Mr. Wolff and those stated by Mr. Riordan.

The Court: Very well. The record will so show.

Mr. Weiss: I ask the Court if the record might

show that I adopt the motions as made by Mr. Friedman, Mr. Dunne, Mr. Wolff, and Mr. Riordan. I would also like to urge this course specifically as to the testimony of Mr. Victor Figone, who was the only witness in this case whose testimony, if true, would have shown some conspiracy with the others in this particular case. However, the record will show what the testimony of Mr. Figone is, or was, and I would ask the Court to dismiss the case and grant the motion for a directed verdict.

The Court: Your motion also will be denied and an exception granted in favor of the defendant.

Thereupon, counsel for all of the defendants rested their case and renewed their motions made at the close of the Government's case for a directed verdict of not guilty [381] on all the counts theretofore stated at the conclusion of the Government's case. The court denied said motions, to which ruling each of the defendants duly Excepted.

Thereupon, the cause was argued to the jury by counsel for the Government and by counsel for each of the defendants, except the defendant Weiss, who argued the cause in his own behalf.

At the conclusion of the arguments, the Court gave the following oral instructions to the jury:

You have listened, ladies and gentlemen, with commendable attentiveness to the evidence in this case, and to the arguments of the various lawyers who have addressed you. I will ask you to attend on what I have to say as to the applicable law in this case. Of course, you are part of the court. You are a part of the judicial process. You have a dif-

ferent function to perform than that which the law requires me to perform. Our provinces are somewhat different. It is your exclusive function to determine the facts in the case. With that duty on your part I cannot interfere. In like manner, it is my duty to instruct you as to the law. You, in turn, must take the law as I give it to you.

It may be that in the *court* of the trial the court has made some comments in connection with ruling upon objections to testimony as to the reasons for the court's ruling. You are not to draw from any of those statements comments that the court was intending to express any opinion as to the facts of the case, or as to what your decision should be on those facts.

Likewise, the court at times interrogated witnesses, or it may be in some cases admonished witnesses with respect [382] to their answers. You are not to draw from that, either, that the court was intending to take sides, as it were, on the issue of fact. What the court did in that regard was only in carrying out the Court's function, indeed its duty, to supervise and expedite the trial of the case.

And so it is that you are the exclusive judges of the facts, and I have no concern with that. Your own independent judgment is the deciding factor in that regard.

You cannot enter into your consideration of this issue that is to be submitted with any preconceived social, political, or economic theories. Your sworn duty is to decide this case on the facts that you heard here in the courtroom. You are not to say

whether you think the Price Law is a good law or a bad law: You are to accept the statement of the court as to the law. Your duty is to take the law the way you find it, the way it is given to you by the Court. You are not to make your decision in this case upon general principles. That is not the function of the juror.

Also I think it is well to call your attention to the fact that you cannot let enter into your consideration of this case any likes or dislikes you may have as to the kind of business the defendants are engaged in, who they are, what religion they have, or how they look to you. That would be letting prejudice enter into your decisions, and that you should not do.

There are some general principles of law that are applicable to all criminal trials. I will briefly call your attention to some of them. I have already told you that you must exclude any prejudices from your mind. You said on your voir dire examination that you hadn't any, and in like manner you must exclude any considerations of sympathy from [383] your consideration of the facts of the case. You are not to concern yourself with the matter of the punishment of the defendants or any of them, in the event of a verdict of guilty as to any of them. The matter of punishment is for the court alone. Your province is only to determine the guilt or innocence of the defendants.

I told you at the time that you were impaneled, and I repeat it now, that there is no presumption of any kind that because the defendants, or any of

thm, have been indicted by the grand jury, that the defendants, or any of them, are guilty. At all stages of this proceeding the defendants and each of them are presumed to be innocent. This presumption continues until the evidence introduced for or on behalf of the Government proves their guilt or the guilt of any of them beyond a reasonable doubt.

The determination of a charge in a criminal case involves the proof of two separate and distinct propositions: First, that the crime that is charged in the indictment was committed; second, that it was committed by the person accused thereof and on trial therefor. These two propositions, and every essential and material fact necessary and correlative thereto, must be established by the Government to a moral certainty and beyond a reasonable doubt.

Now, the question is, of course, what is a reasonable doubt? A reasonable doubt is a doubt raised upon the judgment and reason of him who conscientiously entertains it from the evidence in the case. It is a doubt based upon reason. By such a doubt is not meant every possible or fanciful conjecture that may be suggested or imagined, but a fair doubt based upon reason and common sense, and arising out of the evidence presented.

In every crime there must exist a union or joint operation of act and intent, and for conviction both elements must be [384] proved to a moral certainty and beyond a reasonable doubt. Such intent is merely the purpose or willingness to commit such an act. It does not require any knowledge that such act is a violation of the law. However, a person is

presumed to intend to do all that which he voluntarily and willfully does in fact do, and must also be presumed to intend all the natural, probable and usual consequences of all his own acts.

In judging the evidence, you are not bound to decide in conformity with the statements of any number of witnesses which do not prove conviction in your mind against a lesser number or against a presumption or greater evidence satisfying your minds.

The testimony of an accomplice or a co-conspirator or evidence of oral admissions of a defendant must be received with caution by you. In this case, that is, the case that you are now hearing, proof of the conspiracy charged in the indictment against the defendants must be made independent of admissions of any defendant made after the termination of the alleged conspiracy.

The rule of reasonable doubt that I gave to you a moment ago applies to every material element of the offense charged in the indictment.

Whether or not you believe the witnesses who have testified in this case and the weight to be attached to their testimony respectively, is a matter for your sole and exclusive judgment. We start out with the presumption in law that the witness is presumed to speak the truth. However, this presumption may be negated by the manner in which he or she testifies, by the character of his or her testimony, contradictory evidence, or by his or her motives.

In passing upon the credibility of the various wit-

nesses, it is your right to accept the whole or any part of [385] their testimony, or discard or reject the whole or any part thereof. If it has been shown to you that a witness has testified falsely on any material matter, you should distrust his or her testimony in other particulars. In that event you are free to reject all of the witness' testimony. In scrutinizing, examining and considering the testimony given, the Court suggests to you that the following are standards or criteria by which you can measure the testimony of witnesses: First, consider the circumstances under which the witness testifies; second, his or her demeanor or manner on the stand; third, his or her intelligence, also the connection or relationship which he or she bears to the Government, or to the defendants, or any of them, and also the manner in which he or she might be affected by the verdict; and finally, the extent to which he or she is contradicted or corroborated by other evidence, if at all.

Ladies and gentlemen, you must disregard entirely any testimony stricken out by the Court, or any testimony to which an objection has been sustained. Any document or exhibit which has been admitted for a limited purpose may be only considered by you in connection with that purpose. Testimony which has been admitted only to apply as to a specified defendant may only be considered by you as to that defendant and none other.

In this case, the attorneys who have argued the case have commented upon and have argued upon the evidence. If you find any variance between the

facts testified to by the witnesses and what has been stated to you by counsel to be the facts, to the extent of such variance you must consider only the facts testified to by the witnesses.

In the course of a trial, as in this case, which has run a number of days, and several hundred pages of transcript, [386] as I understand, you may find some discrepancies or inconsistencies in the testimony of a witness, or perhaps between the testimony of different witnesses. If such discrepancies or inconsistencies are not material and they do not affect the true issues of this case, and if they do not reasonably bear upon the guilt or innocence of the defendants, or any of them, do not waste your time in considering them. You should finally use your good judgment, and your good sense also, just as you would in acting upon the most vital and important matters pertaining to your own affairs. You should resolve the facts of the case according to calm, deliberate and cautious judgment, in the light of your own knowledge of the natural tendencies and propensities of human beings. Remember that the defendants, and each of them, are entitled to any reasonable doubt that you may have in your minds. At the same time also remember that if you have no such doubt the Government is entitled to a verdict.

None of the defendants in this case have taken the stand. You must not draw any unfavorable inference from that fact, for under our law a defendant is not required to testify. Neither the prosecution nor the court can or should comment un-

favorably because of any defendant's silence. That is his constitutional and lawful right.

Now, in this case there are five different defendants that are on trial here, all charged with having conspired to violate a law of the United States. Now, let me say to you ladies and gentlemen, that although all of the defendants are charged jointly, that is, by one charge in one indictment, the guilt or innocence of each defendant must be determined by the jury separately. Each defendant has the same right to that kind of consideration on your part as if he were being tried alone. [387]

Some mention has been made by counsel and some discussion by some of them on the subject of circumstantial evidence, and what it means.

Let me say to you that there are two classes of evidence recognized and admitted in courts of justice, upon either of which juries may lawfully find an accused guilty of crime. One is direct or positive testimony of the commission of the crime, and the other is proof in testimony of a chain of circumstances pointing sufficiently strong to the commission of the crime by the defendant, and which is known as circumstantial evidence. Evidence of both classes has been introduced in this case. Such circumstantial evidence may consist of statements by a defendant, plans laid for the commission of the crime—in short, any acts, declarations, or circumstances admitted in evidence tending to connect a defendant with the commission of a crime. There is nothing in the nature of circumstantial evidence that renders it less reliable than the other class of evidence.

If, upon consideration of the whole case you are satisfied to a moral certainty and beyond reasonable doubt of the guilt of the defendant, you should so find, irrespective of whether such certainty has been produced by direct evidence or by circumstantial evidence. The law makes no distinction between the two classes of evidence in the degree of proof required for conviction. It does require, no matter which form of evidence convinces you, that you must be satisfied beyond a reasonable doubt and to a moral certainty.

However, in a case of this type, involving, as it does, a charge of conspiracy, in order to justify a jury in finding a verdict of guilty based entirely on circumstantial evidence, the circumstances must not only be consistent with the guilt of the defendant, but they must be inconsistent with [388] any other reasonable hypothesis that can be predicated on the evidence. In other words, not only must each fact relied upon to show the guilt be proved beyond a reasonable doubt, but such fact must be consistent with all the other facts introduced in the chain of circumstances, and must further be inconsistent with any other rational conclusion than that of guilty.

Now, ladies and gentlemen, the indictment in this case charges the defendants with a conspiracy to sell over the ceiling price certain commodities, that is, over the ceiling price established by the Office of Price Administration, or, rather, according to the formula provided by the Office of Price Administration for the fixing of ceiling prices. I should like to call your attention at this time to certain pro-

visions of the law, not with respect to the conspiracy, but with respect to the price law that is here involved, to the extent to which it is involved. A section of the Federal statute provides:

"Whenever in the judgment of the Price Administration the price or prices of a commodity or commodities have risen or threaten to rise to an extent or in a manner inconsistent with the purposes of this act—that is, the Price Control Act—he may by regulation or order establish such maximum price or maximum prices as in his judgment will be generally fair and equitable and will effectuate the purpose of this act."

The Administrator of the Price Law, pursuant to that authority, adopted and promulgated certain regulations with respect to maximum ceiling prices of various commodities, [389] and these Maximum Price Regulations generally provided that no person could buy or sell above the maximum prices, and that the maximum prices established could not be evaded by direct or indirect methods, whether by finder's fee, brokerage, commission, service, transportation, or other charge or discount, premium or other privilege. Violation of the maximum prices established by the Price Administrator pursuant to the authority vested in him by statute, if willfully and fraudulently done, is made by the law a criminal offense. In this case I will instruct you that the maximum price at which a wholesaler should sell the whiskey which is described in the indictment was \$25.27 per case.

Now, the defendants in this case are not charged

in this indictment with the violation of the Price Control Act as such. They are not charged with selling a commodity in violation of the regulations established by the Price Administrator. Even if the evidence in this case convinced you to the fullest extent that they were guilty of such an act, you could not find them, by virtue of that fact alone, guilty of the charge contained in this indictment. This indictment charges the defendants, not with the substantive offense of selling a commodity over the ceiling price and in contravention of a regulation of the Price Administrator, but it charges the defendants with a conspiracy to do that. By a law enacted a long time ago by our Congress, a conspiracy was made an offense against the law in and of itself. The statute reads as follows:

"If two or more persons conspire either to commit any offense against the United States or to defraud the United States in any manner or for any purpose, and one or more of such parties do any act to effect the objects of such conspiracy," [390] all of the parties to said conspiracy shall be punished as the law provides. In other words, ladies and gentlemen, these defendants are charged with a conspiracy, an agreement to do an unlawful act, to accomplish an unlawful end. The agreement, itself, the conspiracy, itself, is the substantive offense. That being the case, it is important for you to know what the rules of law are that should guide you in determining the fact as to whether or not the defendants are guilty or not guilty of the conspiracy charged.

In order to establish the crime charged, that is, the conspiracy charged in the indictment, it is necessary, first, that the conspiracy or agreement to commit the particular offense against the United States as charged in the indictment be established; and, secondly, to prove further that one or more of the parties engaging in the conspiracy *was* committed some act to effect the object thereof.

To constitute a conspiracy it is not necessary that two or more persons should enter into an express agreement for the unlawful venture or scheme, or that they should directly state between themselves or otherwise what the unlawful plan or scheme is to be, or the details thereof, or the means by which the unlawful combination is to be made effective. It is sufficient if two or more persons, in any manner, positively or tacitly come to a mutual understanding to accomplish a common and unlawful design. In other words, when an unlawful end is sought to be effected, and two or more persons, actuated by the common purpose of accomplishing that end, work together in any way in furtherance of the unlawful scheme, every one of such persons comes a member of the conspiracy. The success or failure of the conspiracy is immaterial, but before a defendant may be found guilty of the charge it must appear beyond a reasonable doubt that a conspiracy was formed, as alleged in the [391] indictment, and that the defendant was an active party thereto.

In order to warrant you in finding a verdict of guilty against the defendants, or any of them, it

is necessary that you be satisfied beyond a reasonable doubt that a conspiracy as charged in the indictment was entered into between two or more of the defendants to violate the law of the United States in the manner described in the indictment. It is unnecessary further that, in addition to the showing of the unlawful conspiracy or agreement, the Government prove to your satisfaction, beyond a reasonable doubt, that one or more of the overt acts described in the indictment was done by one or more of the defendants, or at their direction, or with their aid, to effect the object of the conspiracy.

Under the charge made, the conspiracy constitutes the offense, and it must be made to appear from the evidence, beyond a reasonable doubt, before any defendant can be convicted, that such defendant was a party to the conspiracy and unlawful agreement charged, and that he continued to be such up to the time that overt acts were committed, if the evidence shows that there were any such. The mere fact that either or any of the defendants named may have engaged in the performance of any of the acts charged in the indictment as overt acts, would not authorize a conviction by reason of that fact, alone, but it is necessary to show that such defendant or defendants were parties to the conspiracy and unlawful agreement before their guilt of the offense charged is made out.

Each party must be actuated by an intent to promote the common design. If persons pursue by their acts the same unlawful object, one per-

forming one act and a second another act, all with a view to the attainment of the object they are pursuing, the conclusion is warranted that they are engaged in a conspiracy to effect that object. Cooperation in [392] some form must be shown. There must be intentional participation in the transaction, with a view and purpose to further the common design. And if a person, understanding the unlawful character of a transaction, encourages, advises, or in any manner, with a purpose to forward the enterprise or scheme, assists in its prosecution, he becomes a conspirator. And so a new party, coming into a conspiracy after its inception, with knowledge of its purpose and object, and with intent to promote the same, becomes a party to all of the acts done before his introduction into the unlawful combination, as well as to the acts done afterwards. Joint assent and joint participation in the conspiracy may be found, like any other fact, as an inference from facts proved.

Where the existence of a criminal conspiracy has been shown, every act or declaration of each member of such conspiracy, done or made thereafter pursuant to the concerted plan and in furtherance of the common object, is considered the act and declaration of all the conspirators, and is evidence against each of them. On the other hand, after a conspiracy has come to an end, either by the accomplishment of the common design, or by the parties abandoning the same, evidence of acts or declarations thereafter made by any of the conspirators

can be considered only as against the person doing such acts or making such statements.

In that connection, you will recall that I advised you during the trial of the case that the statements made by the defendants Goldsmith and Weiss to the witness Harkins could only be considered by you as against those two named defendants.

The declaration or act of a conspirator not in execution of the common design, is not evidence against any of the parties other than the one making such declaration. [393]

The evidence in proof of the conspiracy may be circumstantial. Where circumstantial evidence is relied upon to establish the conspiracy, or any other essential fact, it is not only necessary that all the circumstances concur to show the existence of the conspiracy or fact sought to be proved, but such circumstantial evidence must be inconsistent with any other rational conclusion. That is, you are to consider all of the circumstances and conditions shown in evidence, and if it appears to you as reasonable men that, even though there is no direct evidence of the actual participation in the alleged offense by the defendants, or either of them, a reasonable inference from all of the facts and circumstances does to your minds, beyond a reasonable doubt, show that the defendants, or some of them, were parties to the conspiracy as charged, then you should make the deduction and find accordingly.

It is not necessary that it be shown that any person concerned in the alleged conspiracy profited

by the things which he did, but if any of the defendants, with knowledge that the law was designed to be violated in the particular manner charged in the indictment, aided in any way by affirmative action in the accomplishment of the unlawful act, they would be guilty.. To this statement there is but one exception, and that is, if before any overt act has been committed on the part of any conspirator or at his suggestion, or with his aid or participation, any such conspirator withdraws from the conspiracy and wholly disassociates himself from the project, or the carrying out thereof, he ceases to be a conspirator and is without guilt.

An overt act need not be criminal in nature, if considered separately and apart from the conspiracy; it may be as innocent as the act of a man walking across the street, [394] or driving an automobile, or using a telephone. But, if during the existence of the conspiracy, the overt act is done by one of the conspirators to effect the object of the conspiracy, the crime is complete, and it is complete as to every party found by you to be a member of the conspiracy, no matter which one of the parties did the overt act.

It is not necessary that all the overt acts charged be proved, but it is necessary that at least one of these be proved, and that it be shown to have been in furtherance of the object of the conspiracy. Other overt acts than those charged may be given in evidence, but proof of one of those charged in the indictment is indispensable.

Now, ladies and gentlemen, if you can conscien-

tiously do so you are expected to agree upon a verdict. You should freely consult with one another in the jury room. If any one of you should be convinced that your view of the case is erroneous, do not be stubborn and do not hesitate to abandon your own view under such circumstances. On the other hand, it is entirely proper to adhere to your own view if after a full exchange of ideas you still believe you are right. In this case, as I have already told you, there are five defendants. Having in mind all the instructions and rules of law that I have given to you, you may find all the defendants guilty, or all the defendants not guilty. You may find any one of the defendants either guilty or not guilty, in accordance with the rules and statements as to the law that I have given to you.

The court desires finally to caution you that if it becomes necessary for you to communicate with the court during your deliberations, or upon your return to court, with respect to any matter connected with the trial of this case, you should not indicate to the court in any manner how the jury stands numerically, or otherwise, on the question of the guilt or [395] innocence of the defendants, or any or either of them. This caution you should observe at all times after the case is submitted to you until you have reached a verdict. Whenever all of you agree to a verdict, it is the verdict of the jury. In other words, you must come to a unanimous decision. When you retire to the jury room to deliberate you should select one of your

number as foreman or forelady, as the case may be, and he or she will sign your verdict for you when it has been agreed upon, and he or she will represent you as your spokesman in the further conduct of this case in this court.

Thereupon, counsel for the defendants noted the following Exceptions to the charge of the Court:

Mr. Friedman: I will be as brief as possible. If the Court please, at this time I desire to note certain exceptions to the court's charge, and certain exceptions to the failure of the court to charge on certain principles of law, all on behalf of the defendant Feigenbaum.

First, I desire to note an exception to that portion of the charge which informed the jury that a person is presumed to intend the natural and probable consequences of his voluntary acts. I make that upon the ground that the crime of conspiracy involves a specific intent, and the presumption of intention as embodied in the court's instruction does not apply.

I desire to note an exception to that portion of the court's charge which told the jury that if they found any inconsistencies in the testimony of any of the witnesses that did not bear upon the defendant's guilt or innocence and was inconsequential, that they should disregard it. I note an exception to that on the ground that the jury have a right to consider even inconsequential inconsistencies in determining the credibility of a witness.

I likewise desire to note an exception to the court's charge dealing with the crime of conspiracy,

in which the court told the jury that if two persons, even acting independently, or words to that effect, were acting toward the accomplishment of the same and common end, that that constituted a conspiracy. I note an exception to that on the ground that such is not the law of conspiracy. There must be only a concert of intent and a concert of action, but that the parties must intend to bring about a result common——

The Court: Please do not argue, Mr. Friedman. You know we have a jury waiting. Just note your exceptions.

Mr. Friedman: I desire to note an exception to the court's failure to give Feigenbaum's instruction No. 3, which has to do with the fact that sellers do not conspire with buyers; likewise Feigenbaum's instruction No. 4——

The Court: Your instructions are numbered, as I recall it.

Mr. Friedman: Oh, yes.

The Court: I will file them and you will have a means of identifying them in the record; so you need not refer to them except by number.

Mr. Friedman: If that is understood, the court knows what the subject is of the instructions, so if I have to go upstairs they may not say, "You did not call to the court's attention what it is all about."

The Court: I have read over the instructions, and I will say to you that I decided to give my own instructions on the matter, so you could just run down them by number.

Mr. Friedman: All right, I desire to note an exception to the court's failure to give Feigenbaum's requested instruction No. 4; likewise requested instruction No. 5, which deal with the same subject matter as No. 3; likewise his requested instruction No. 6, which deals with the same subject [397] matter; likewise requested instruction No. 7; likewise Feigenbaum's requested instruction No. 8.

On this I would like to mention to your Honor, because you might reconsider it, Feigenbaum's requested instruction No. 8 was if they found that Feigenbaum only conspired with Taylor and Humes to do certain acts, that that was not the conspiracy charged in this indictment. Feigenbaum instruction No. 8:

I desire to note an exception to your Honor's refusal to give Feigenbaum's requested instruction No. 20, which simply means if all the evidence, whether direct or circumstantial, is equally compatible with innocence, they must return a verdict of not guilty.

I likewise desire to note an exception to your Honor's refusal to give Feigenbaum's requested instruction No. 22—I will withdraw that about 22; your Honor covered it after I had marked it.

And lastly, I desire to note an exception to your Honor's refusal to give Feigenbaum's requested instruction No. 26, which is on the law of circumstantial evidence, and which, while your Honor instructed on all phases of it, you did not tell the jury they must follow the hypothesis of innocence which is contained in that construction.

Lastly, I desire to note an exception to the refusal to give Feigenbaum's requested instruction No. 27; likewise requested instruction No. 28; and likewise requested instruction No. 29, which are to the effect that in considering whether or not there was a conspiracy, of which Feigenbaum was a member, no acts or declarations of any alleged co-conspirator made or done out of his presence could be considered in determining either the conspiracy or his connection therewith. [398]

The Court: All your exceptions will be noted, Mr. Friedman.

Mr. Dunne: If your Honor please, in so far as Mr. Friedman stated exceptions to the charge as given, on behalf of the Defendant Goldsmith we desire to adopt them. I take it that it will not be necessary to repeat them. Your Honor has them in mind.

The Court: Yes.

Mr. Dunne: Very well. On behalf of the defendant Goldsmith, further, we respectfully except to the instruction of the court in defining "intent", which in substance and effect told the jury that intent does not require knowledge, that the act in question is a violation of the law, upon the ground that a conspiracy to violate the OPA statute, the statute here in question, does require specific intent, and that particularly in respect to the defendant Goldsmith it requires in intent to agree to deliver over the ceiling price, and requires knowledge of the ceiling price.

Your Honor further instructed; and to this we

respectfully except, that a party who with knowledge of the design furthers it, is guilty of a conspiracy, both upon the ground that mere aid, without some knowledge of an unlawful act and information that the thing is going to be used illegally, does not make him a party to a conspiracy, nor does it make him a party to a conspiracy even if he knows there is a conspiracy to act unlawfully.

We respectfully note an exception to your Honor's instruction that the jury are at liberty to find one defendant guilty although it finds the other defendants not guilty, on the ground that under the indictment and evidence in this case the jury must return a verdict of guilty as to two defendants at least or all defendants must be found not guilty.

The Court: Mr. Dunne's exceptions will be noted.

Mr. Riordan: May I adopt counsels' exceptions in each instance? That will save a lot of time. And now I have only these two suggested matters that I would respectfully request your Honor to give instructions on, as the evidence has been adduced here. I do not know whether instructions were handed in by us individually. I would say to your Honor I would like an instruction to this jury that such admitted co-conspirators as Travis and Figone and, without going into too many of those, Fingerhut, that their testimony, because of that condition, should be viewed with caution. I used "great caution" in my argument, but to be extremely tactful, it should be viewed with caution. That is one suggestion to your Honor.

The other is, if a witness is false in one material

statement of his or her testimony, the jury has a right to disregard all of the testimony. Those two instructions I respectfully ask your Honor to give, and if you do not think those should be given, I should like, respectfully, to note an exception.

The Court: I already gave those.

Mr. Riordan: Both of those?

The Court: Yes.

Mr. Riordan: I am a little hard of hearing.

The Court: However, the exception will be noted.

Mr. Riordan: The exception will be noted if they were not given.

The Court: Yes, the exception will be noted.

Mr. Abrams: Your Honor, on behalf of the defendant Abel, let the record indicate that the defendant Abel makes the same exceptions heretofore interposed by Mr. Friedman on behalf of his client, defendant Feigenbaum, and by Mr. Dunne [400] on behalf of his client, defendant Goldsmith, and by Mr. Riordan on behalf of his client, defendant Blumenthal; and may it be deemed and considered that the same exceptions noted by them to your Honor's instructions will be noted on behalf of the defendant Abel? And, in addition to that, your Honor, may we have an exception to your Honor's refusal or failure to give instructions requested by the defendant Abel, numbered 1, 8, 13, 23, 24, 25, 26, 27 and 28?

The Court: Very well. Those exceptions will be noted.

Mr. Riordan: May I adopt Mr. Abrams' exceptions, to protect the record?

The Court: If all of you want to adopt each other's exceptions, let the record so show.

Mr. Dunne: Yes, if Your Honor please. Thank you.

Mr. Friedman: I am not his counsel, but may I suggest that the court give to Mr. Weiss all the exceptions that everybody else have?

The Court: Let the record show that Mr. Weiss may have the same objections and all the exceptions that have been taken by other counsel, as if they had been made by him.

(Note: There was an Exception taken to the refusal to give certain instructions proposed by defendant Abel.)

Defendant Feigenbaum's instruction No. 3 referred to by Mr. Friedman is as follows:

The indictment in this case charges the defendant Feigenbaum with having conspired with Louis Abel, Lawrence B. Goldsmith; Samuel S. Weiss and Harry Blumenthal, to unlawfully sell, at wholesale, certain Old Mister Boston Rocking Chair Whiskey in excess of and higher than the maximum price [401] established by law. If you find from the evidence that the defendant Feigenbaum merely purchased or agreed to purchase certain cases of Old Mister Boston Rocking Chair Whiskey from any other defendant in this case or that the defendant Feigenbaum merely acted as the servant or agent or for or on behalf of one L. H. Taylor and/or one R. C. Humes for the purpose of purchasing for them certain Old Mister Boston Rocking Chair

Whiskey from one or more of the other defendants in this case, and if you further find that the said defendant Feigenbaum was not acting as the servant, agent or employee of any other defendant named in this case, for the purpose of selling said whiskey, then you must return a verdict herein finding the defendant not guilty."

Defendant Feigenbaum's requested instruction No. 4 is as follows:

"Before you can find any defendant guilty in this case, it is necessary that the prosecution establish to a moral certainty and beyond a reasonable doubt that the conspiracy set forth in the indictment existed and that any such defendant was a member of that particular conspiracy. The conspiracy relied on by the Government in this case is one wherein the defendant Lawrence G. Goldsmith, doing business as the Franciscan Distributing Company, was the owner and seller of the Old Mister Boston Rocking Chair Whiskey described in the indictment and that the defendants in this case did conspire with each other to sell the particular Old Mister Boston Rocking Chair Whiskey that was acquired and owned by the defendant Lawrence B. Goldsmith. If you find that the defendant Feigenbaum in this case may have agreed with some person other than the defendants in this case to sell to such person cases of Old Mister Boston Rocking Chair Whiskey and [402] that the said Feigenbaum, in order to make said sale to said third person, did buy from one of the defendants in this case, cases

of such whiskey, and you do not find anything more on behalf of the defendant Feigenbaum, you must return a verdict herein finding the defendant Feigenbaum not guilty for the reason that he never became a member of the conspiracy charged in the indictment relied on by the Government, even though you should find that the sale of such whiskey by Feigenbaum to such third person was in excess of the maximum price established by law for such sale."

Defendant Feigenbaum's requested instruction No. 5 is as follows:

"If you find from the evidence in this case that the acts and conduct of the defendant Albert Feigenbaum amounted to no more than an action on his part to purchase, either for himself or for some other person, Old Mister Boston Rocking Chair Whiskey, and that he did so purchase said whiskey, then you must find that the defendant Feigenbaum was not a member of the conspiracy set forth and charged in the indictment and you must return a verdict herein finding the defendant Feigenbaum not guilty."

Defendant Feigenbaum's requested instruction No. 6 is as follows:

"I instruct you that where a transaction consists on the one hand of the selling of an article, that is either prohibited by law or that is being sold in a manner that violates the law, and on the other

hand by the purchase of such article by another person, then, under such circumstances, the buyer and the seller are not guilty of a conspiracy to sell such article. Therefore, if you find from the facts in this case that the transaction involved amounted on the one hand to some of the defendants, other than Feigenbaum agreeing [403] to sell the whiskey described in the indictment at a price prohibited by law, and on the other hand that the defendant Feigenbaum merely agreed to purchase for himself or for some other person, some of said whiskey at said price, then you must find that the defendant Feigenbaum was not a member of any conspiracy that had for its object the selling of said whiskey, he being merely a purchaser or agent for the purchaser thereof. Under the circumstances you must return a verdict finding the defendant Feigenbaum not guilty."

Defendant Feigenbaum's requested instruction No. 7 is as follows:

"If you find from the evidence in this case that the defendant Feigenbaum did agree with a man named H. L. Taylor and/or with a man named R. C. Humes to sell to either or both of such persons certain Old Mister Boston Rocking Chair Whiskey at a price in excess of the maximum price established by law, but if you also find that the defendant Feigenbaum had not agreed with any other defendant in this case to sell any Old Mister Boston Rocking Chair Whiskey at a price above that provided by law, then you must return a verdict herein

finding the defendant Feigenbaum not guilty on the ground that he was not a member of the conspiracy charged in the indictment."

Defendant Feigenbaum's requested instruction No. 8 is as follows:

"I instruct you that the defendant Albert Feigenbaum is not on trial for conspiring or agreeing with H. L. Taylor or R. C. Humes to sell to said R. L. Taylor or R. C. Humes, Old Mr. Boston Rocking Chair Whiskey at a price in excess of the maximum price established by law. If the evidence in this case only establishes or tends to establish that the defendant Feigenbaum only conspired and agreed with [404] H. L. Taylor and R. C. Humes to sell said whiskey, at a price in excess of the maximum price established by law, you must return a verdict finding the defendant Feigenbaum not guilty as that would not be the conspiracy charged in the indictment and for which the defendant Feigenbaum is on trial."

Defendant Feigenbaum's requested instruction No. 20 is as follows:

"Where an act may be attributed to a criminal or an innocent cause, it is the duty of the jury to attribute the act to the innocent cause rather than to the criminal one. A crime is never presumed where the conditions may be explained upon an innocent hypothesis. It is the duty of the jury, to reconcile, if possible, all circumstances shown in evidence with the innocence of each defendant and

to account for all facts, if possible, upon the hypothesis that the defendant is not guilty."

Defendant Feigenbaum's requested instruction No. 22 is as follows:

"When independent facts and circumstances are relied upon to establish, by circumstantial evidence, the guilt of a defendant, each material, independent fact or circumstance in the chain of facts relied upon must each be established to a moral certainty and beyond a reasonable doubt. If in the chain of facts of circumstantial evidence any one or more of the material facts in such chain are not established to a moral certainty and beyond a reasonable doubt, the entire proof fails and a verdict of not guilty must be returned."

Defendant Feigenbaum's requested instruction No. 26 is as follows:

"The evidence in this case on which the prosecution relies is circumstantial evidence. Where the evidence relied on for a conviction is circumstantial such evidence [405] must be not only consistent with the hypothesis of guilt but inconsistent with any other rational hypothesis. Therefore, if you find in this case that the evidence leads to two opposing and rational conclusions, one that the defendant Feigenbaum is guilty and the other that the defendant is not guilty, it is your duty to adopt the conclusion that the defendant is not guilty and return a verdict finding the defendant Feigenbaum not guilty."

Defendant Feigenbaum's requested instruction No. 27 is as follows:

"In order for you to find the defendant Albert Feigenbaum guilty of the crime of conspiracy as charged in the indictment it is necessary that you find, among other things, to a moral certainty and beyond a reasonable doubt that a conspiracy existed between at least two persons to do the things set forth in the indictment and that Albert Feigenbaum was a member of such conspiracy. In determining whether such conspiracy existed and that Feigenbaum was a member of such conspiracy you cannot take into consideration and must disregard all testimony and evidence relating to the acts and declarations of any alleged conspirator, other than the defendant Feigenbaum, said or done out of the presence of the defendant Feigenbaum. The existence of the conspiracy charged and Feigenbaum's connection therewith must be established by evidence independently of the acts and declarations of any alleged co-conspirator of Feigenbaum's said or done out of the presence of the defendant Feigenbaum."

Defendant Feigenbaum's requested instruction No. 28 is as follows:

"In determining whether a conspiracy existed, as charged in the indictment, and that the defendant Feigenbaum was a member of such conspiracy, I instruct you that you [406] cannot consider testimony of the acts or declarations of any other person, charged in the indictment with being a co-conspira-

tor with Feigenbaum, where such acts or declarations were done or made out of the presence of defendant Feigenbaum."

Defendant Feigenbaum's requested instruction No. 29 is as follows:

"In determining whether the conspiracy charged in the indictment existed and that Albert Feigenbaum was a member of such conspiracy you must reject and disregard all evidence and testimony in the case relating to anything said or done, out of the presence of defendant Feigenbaum, by the defendants Goldsmith, Blumenthal, Weiss and Abel."

The defendant Abel's requested instructions numbered 1, 8, 13, 23, 24, 25, 26, 27 and 28, are respectively, as follows: [407]

INSTRUCTION No. 1

Subject: Directed Verdict.

The evidence in this case is insufficient to warrant the conviction of the defendant Louis Abel and you are, therefore, instructed to return a verdict of not guilty. [408]

INSTRUCTION No. 8

Subject: Suspicious Circumstances.

I charge you that you cannot convict the defendant Louis Abel on suspicious circumstances, no matter how strong the circumstances may be; nor should you return a verdict of guilty on mere conjecture or speculation.

Tingle v. U. S. 38 Fed. (2) 573

Reavis v. U. S. 93 Fed. (2) 307

Ching Wan et al, v. U. S. 35 Fed. (2) 665

Kassin v. U. S. 87 Fed. (2) 183 [409]

INSTRUCTION No. 13

Subject: Conspiracy.

A conspiracy to commit a crime is not likely to exist between strangers.

State v. Gadbais, 289 Iowa, 25. [410]

INSTRUCTION No. 23

The defendant Louis Abel is only on trial for the offense of conspiracy as set forth in the indictment. He is not on trial for the offense of either buying or selling whiskey in excess of or higher than the maximum price established by law: He is not on trial for the buying or selling of whiskey at all.

Submitted by Deft. Louis Abel. (Signed) Harry K. Wolff. (Signed) Sol A. Abrams, Attys. [411]

INSTRUCTION No. 24

The indictment in this case charges the defendant Abel with having conspired with Albert Feigenbaum, Lawrence B. Goldsmith, Samuel S. Weiss and Harry Blumenthal to unlawfully sell, at wholesale, certain Old Mister Boston Rocking Chair Whiskey in excess of and higher than the maximum price established by law. If you find from the evidence

that the defendant Abel merely purchased or agreed to purchase certain cases of Old Mister Boston Rocking Chair Whiskey from any other defendant in this case or that the defendant Abel merely acted as the servant or agent or for or on behalf of Norman Reinberg or others for the purpose of purchasing for them certain Old Mister Boston Rocking Chair Whiskey from one or more of the other defendants in this case, and if you further find that the said defendant Abel was not acting as the servant, agent or employee of any other defendant in this case and was not acting for or on behalf of any other defendant named in this case, for the purpose of selling said whiskey, then you must return a verdict herein finding the defendant not guilty. [412]

INSTRUCTION No. 25

If you find from the evidence in this case that the acts and conduct of the defendant Louis Abel amounted to no more than an action on his part to purchase, either for himself or for some other person, Old Mister Boston Rocking Chair Whiskey, and that he did so purchase said whiskey, then you must find that the defendant Abel was not a member of the conspiracy set forth and charged in the indictment and you must return a verdict herein finding the defendant Abel not guilty. [413]

INSTRUCTION No. 26

I instruct you that where a transaction consists on the one hand of the selling of an article that is

either prohibited by law or that is being sold in a manner that violates the law, and on the other hand by the purchase of such article by another person, then, under such circumstances, the buyer and the seller are not guilty of a conspiracy to sell such article. Therefore, if you find from the facts in this case that the transaction involved amounted on the one hand to some of the defendants, other than Abel agreeing to sell the whiskey described in the indictment at a price prohibited by law, and on the other hand that the defendant Abel merely agreed to purchase for himself or some other person, some of said whiskey at said price, then you must find that the defendant Abel was not a member of any conspiracy that had for its object the selling of said whiskey, he being merely a purchaser or agent for the purchaser thereof. Under such circumstances you must return a verdict finding the defendant Abel not guilty. [414]

INSTRUCTION No. 27

If you find from the evidence in this case that the defendant Abel did agree with a man named Reinberg or some other person to sell to either or both of such persons certain Old Mister Boston Rocking Chair Whiskey at a price in excess of the maximum price established by law, but if you also find that the defendant Abel had not agreed with any other defendant in this case to sell any Old Mister Boston Rocking Chair Whiskey at a price above that provided by law, then you must return a verdict herein finding the defendant Abel not guilty on the ground

that he was not a member of the conspiracy charged in the indictment. [415]

INSTRUCTION No. 28

If you find from the evidence that two, or more defendants in this case other than the defendant Abel had conspired and agreed together to sell said whiskey described in the indictment at a price in excess of that established by law, and that after the formation of such conspiracy the defendant Abel did do some act either individually or in conjunction with some other person, which act operated in furtherance of the objects of the prior conspiracy, but that in the doing of such act or acts the defendant Abel had no knowledge of the existence of any such conspiracy, then you must return a verdict finding the defendant Abel not guilty for the reason that he never became a member of the conspiracy as charged and set forth in the indictment:

Thereupon the jury retired to deliberate upon their verdict, and thereafter returned into court, and upon being asked by the court whether they had agreed upon a verdict, answered that they had agreed. Thereupon the following proceedings were had:

The Court: Will you hand it to the Deputy Marshal, please? Mr. Clerk, will you read the verdict, please?

The Clerk: Ladies and Gentlemen: Harken to your Verdict as it will stand recorded:

"We the jury find as to the defendant at bar as follows: Harry Blumenthal, guilty; Louis Abel, [416] guilty; Lawrence B. Goldsmith, guilty; Samuel S. Weiss, guilty; Albert Feigenbaum, guilty.

ETHEL L. FAIRBAIRN,
Foreman."

So say you all?

Thereupon the jurors answered in the affirmative.

To this verdict of the jury, counsel for the defendants and each of them then and there duly Excepted.

Thereupon the said Court pronounced judgment and sentence of fine and imprisonment upon each of the said defendants, to which said sentence and judgment the said defendants, and each of them, duly Excepted, all of which from the record on file in the office of the Clerk of this Court fully and at large appears.

Thereafter the defendants and each of them, other than the defendant Weiss, by and through their respective counsel, and the defendant Weiss in his own proper person, made and argued their several motions for a new trial, and their several motions in arrest of judgment, all of which from the record and proceedings in the cause entitled as above fully and at large appears. The court denied the said motions of the said defendants and of each of them, to which rulings of the court each of the said defendants duly Excepted.

Thereafter and within due and legal time, the said defendants and each of them duly appealed

from the judgment aforesaid to the United States Circuit Court of Appeals for the Ninth Circuit, and filed their several notices of appeal herein, as from the record of this honorable court [417] in the cause entitled as above fully and at large appears.

And Now, and within due and legal time, and within the time allowed by law and by the order of this honorable court, the said defendants, and each of them, respectfully present this, their Bill of Exceptions, to be used upon their several appeals to the said United States Circuit Court of Appeals for the Ninth Circuit, and pray that the said bill be settled, approved and allowed by the honorable the District Judge who presided at the trial of the above entitled cause, and that as settled, the said bill be made a part of the record upon the appeals aforesaid.

CERTIFICATE OF TRIAL JUDGE TO BILL OF EXCEPTIONS

To the end that the matters and things aforesaid may be and remain of record herein, the foregoing Bill of Exceptions is hereby settled, approved and allowed as containing the full substance of all the evidence and proceedings taken and had upon the trial of the above entitled cause, and as being in all particulars full, true and correct.

Dated August 28th, 1945.

(Signed) LOUIS E. GOODMAN

United States District Judge.

**STIPULATION RE SETTLING OF BILL OF
EXCEPTIONS, ETC.**

It is hereby stipulated and agreed by and between the respective parties hereto that the foregoing bill of exceptions on behalf of the defendants on appeal herein to the United States Circuit Court of Appeals, in and for the Ninth Circuit, has been duly presented within the time allowed by law and the rules and orders of this court, and that the same is in proper form and conforms to the truth and sets forth all of the evidence and all of the proceedings relating to the trial of said defendants and that it may be settled, allowed, signed, and authenticated by the United States District Court and the Judge thereof as the true bill of exceptions on behalf of said defendants and that it may be made a part of the record in this case.

Dated at San Francisco, California, August 28, 1945.

LEO R. FRIEDMAN

Attorney for Defendant
Feigenbaum

MORRIS OPPENHEIM

Attorney for Defendant
Blumenthal

GEORGE OLSHAUSEN

Attorney for Defendant Abel

WALTER H. DUANE

ARTHUR B. DUNNE

Attorneys for Defendant
Goldsmith

United States of America

417

SAMUEL S. WEISS

In Propria Persona

FRANK J. HENNESSY,

United States Attorney

By REYNOLD H. COLVIN

Deputy [419]

Receipt of copy of the foregoing Bill of Exceptions is hereby admitted this 3rd day of July, 1945.

(Signed) **FRANK J. HENNESSY**

U. S. Attorney

By T. SOLOMON

[Endorsed]: Filed Aug. 28, 1945. [420]

[Title of Court and Cause.]

**STIPULATION AND ORDER RELATIVE
TO EXHIBITS ON APPEAL**

It is hereby stipulated by and between the attorneys for the United States and the defendant and appellants above named that all exhibits introduced in evidence at the trial of the above entitled cause and now in the custody of the Clerk of the above entitled Court need not be set forth in the bill of exceptions of defendants but shall be deemed to be included therein as a part of said bill of exceptions with the same effect in all respects as if incorporated in and set forth in said bill of exceptions.

It is further Stipulated that all said exhibits be, together with the record on appeal, transmitted by

the Clerk of the above entitled court to and filed in the Office of the Clerk of the United States Circuit Court of Appeals for the [421] Ninth Circuit.

It is further Stipulated that such of said exhibits that either of the parties to the above action may deem material may be printed in the brief or briefs of such party or parties or in an appendix or supplement thereto with like force and effect as if said exhibits were set forth in full in said bill of exceptions.

Dated: July 19, 1945.

THOS. J. RIORDAN

Attorney for Defendant
Blumenthal

WALTER DUANE

ARTHUR B. DUNNE

Attorney for Defendant
Goldsmith

GEORGE OLSHAUSEN

Attorney for Defendant Abel

LEO R. FRIEDMAN

Attorney for Defendant
Feigenbaum

SAMUEL S. WEISS

In Propria Persona

FRANK J. HENNESSY

United States Attorney

By **R. H. COLVIN**

Assistant United States
Attorney

ORDER

The foregoing stipulation is hereby approved and it is so ordered accordingly..

Dated: July 23, 1945.

LOUIS E. GOODMAN

United States District Judge.

[Endorsed]: Filed July 24, 1945. [422]

[Title of Court and Cause.]

PRAECIPE FOR RECORD

On Appeal to the United States Circuit Court of Appeals for the Ninth Circuit.

To the Clerk of Said District Court:

Kindly furnish the following papers, to be used on the appeals of the defendants in the above entitled [423] action to the United States Circuit Court of Appeals for the Ninth Circuit:

1. The caption.
2. The names and addresses of counsel.
3. The Indictment.
4. All Demurrers to the Indictment.
5. All motions to Quash the Indictment.
6. All minutes of proceedings on demurrers of the several defendants to said Indictment.
7. All proceedings on motions to Quash Indictment.

8. All minutes of orders over-ruling demurrers to Indictment and denying motions to quash indictment.

9. All minutes of the Pleas of the several defendants to Indictment.

10. All minutes of Trial.

11. The Verdict of the Jury.

12. The several Motions of the Defendants for a New Trial.

13. All Motions in arrest of Judgment.

14. The orders denying the several motions for a new trial.

15. The orders denying the several motions in arrest of Judgment.

16. The motion of the defendant Blumenthal for a Directed Verdict.

17. The Order denying the last-mentioned Motion.

18. The Judgment and Sentences.

19. The several notices of appeal filed by each of the several Defendants.

20. The engrossed and settled Bill of Exceptions.

21. The several assignments of errors severally filed by each of the said defendants. [424]

22. The Praeceptum.

23. The Certificate of the Clerk to the Transcript.

24. Order and stipulation relative to exhibits.

Dated: September 20, 1945.

MORRIS OPPENHEIM

Attorney for Defendant

Harry Blumenthal

GEORGE G. OLSHAUSEN

Attorney for Defendant Louis

Abel

ARTHUR B. DUNNE

WALTER H. DUANE

Attorneys for Defendant

Lawrence B. Goldsmith

LÉO R. FRIEDMAN

Attorney for Defendant

Albert Feigenbaum

S. S. WEISS

Defendant in propria persona

(Acknowledgment of Service.)

[Endorsed]: Filed Sept. 20, 1945. [425]

District Court of the United States,

Northern District of California

**CERTIFICATE OF CLERK TO TRANSCRIPT
OF RECORD ON APPEAL**

I, C. W. Calbreath, Clerk of the District Court of the United States, for the Northern District of California, do hereby certify that the foregoing 425 pages, numbered from 1 to 425, inclusive, contain a full, true, and correct transcript of the records and proceedings in the case of United States of Amer-

ica vs. Harry Blumenthal, Louis Abel, Lawrence B. Goldsmith, Samuel S. Weiss and Albert Feigenbaum, Defendants, No. 29238 G, as the same now remain on file and of record in my office.

I further certify that the cost of preparing and certifying the foregoing transcript of record on appeal is the sum of \$20.30 and that the said amount has been paid to me by the Attorneys for the appellants herein.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said District Court at San Francisco, California, this 22nd day of December, A.D. 1945.

[Seal]

C. W. CALBREATH,

Clerk

M. E. VAN BUREN

Deputy Clerk [426]

[Endorsed]: No. 11232. United States Circuit Court of Appeals for the Ninth Circuit. Harry Blumenthal, Louis Abel, Lawrence B. Goldsmith, Samuel S. Weiss and Albert Feigenbaum, Appellants, vs. United States of America, Appellee. Transcript of Record. Upon Appeals from the District Court of the United States for the Northern District of California, Southern Division.

Filed January 18, 1946.

PAUL P. O'BRIEN

Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

In the United States Circuit Court of Appeals
for the Ninth District

No. 11232

HARRY BLUMENTHAL, LOUIS ABEL, LAW-
RENCE C. GOLDSMITH, SAMUEL S.
WEISS, and ALBERT FEIGENBAUM,
Appellants,

vs.

UNITED STATES OF AMERICA,
Appellee.

STATEMENT OF POINTS ON WHICH LAW-
RENCE C. GOLDSMITH, APPELLANT,
INTENDS TO RELY AND DESIGNATION
OF RECORD ON APPEAL

Comes Now, Lawrence C. Goldsmith, appellant herein, by his attorneys Arthur B. Dunne and Walter H. Duane and files herein his Statement of Points on Which He Intends to Rely upon Appeal and Designation of Record on Appeal.

Lawrence C. Goldsmith, appellant herein, states that he intends to rely upon the assignment of errors heretofore filed, and which is incorporated herein as if set forth in full, and herein states that he will rely upon all of the assignment of errors therein stated.

Lawrence C. Goldsmith, appellant, herein designates the entire transcript of the record and proceedings in the United States District Court, for the Northern District of California, Southern Di-

vision and numbered Number 29238 G in said Court to be printed, except that the original exhibits introduced in said trial court are not to be printed; said exhibits, pursuant to stipulation filed herein, are to be considered in their original form.

ARTHUR B. DUNNE

WALTER H. DUANE

Attorneys for Lawrence C.

Goldsmith, Appellant

Service of a copy of the above is hereby admitted
this 28 day of January, 1946.

FRANK J. HENNESSY

United States Attorney

By REYNOLD H. COLVIN

Assistant United States

Attorney

[Endorsed]: Filed January 28, 1946. Paul P.
O'Brien, Clerk.

[Title of Circuit Court of Appeals and Cause.]

**STIPULATION AND ORDER RELATIVE TO
TRANSCRIPT OF RECORD AND TO
ORIGINAL EXHIBITS**

It is hereby stipulated that the original exhibits, introduced in the trial of the above cause in the United States District Court for the Northern District of California, Southern Division, and numbered No. 29,238-G in said Court, all said exhibits being now in file with this Court in this cause together with the certified transcript of record of said proceedings in said District Court, need not be reproduced or printed but may be considered in their original form and with like force and effect as if said exhibits were reproduced or printed in said transcript.

It is further stipulated that any of the parties hereto may make reference to said exhibits in its briefs filed or to be filed herein in all respects as though said exhibits had been reproduced or printed in said transcript.

It is further stipulated that should any of the parties hereto so desire said party may print any exhibit in its brief or briefs filed or to be filed herein or in any appendix or supplement to said brief in all respects as though said exhibits had been reproduced and printed in said transcript.

Dated: January 24th, 1946.

MORRIS OPPENHEIM

Attorney for Defendant
Blumenthal

ARTHUR B. DUNNE

WALTER H. DUANE

Attorneys for Defendant
Goldsmith

GEORGE G. OLSHAUSEN

Attorney for Defendant Abel

LEO R. FRIEDMAN

Attorney for Defendant
Feigenbaum

SAMUEL S. WEISS

In Propria Persona

FRANK J. HENNESSY

United States Attorney

By **REYNOLD H. COLVIN**

Assistant United States
Attorney

ORDER

The foregoing stipulation is hereby approved and
it is so ordered.

FRANCIS A. GARRECHT

Circuit Judge

[Endorsed]: Filed January 29, 1946. Paul P.
O'Brien, Clerk.

[Title of Circuit Court of Appeals and Cause.]

**ALBERT FEIGENBAUM'S STATEMENT OF
POINTS ON WHICH HE INTENDS TO
RELY ON APPEAL AND DESIGNATION
OF RECORD ON APPEAL.**

Comes now Albert Feigenbaum, one of the appellants above named, and advises the court that on his appeal he intends to rely on each and all of the points specified as errors in his assignment of errors heretofore filed, special reference to said assignment of errors being hereby made and by said reference incorporated herein.

Said appellant designates the entire record be printed in that he believes that the same is necessary to fully support and present his position on appeal.

Dated: February 6, 1946.

(Signed) LEO R. FRIEDMAN

Attorney for Albert Feigen-
baum

[Endorsed]: Filed February 16, 1946. Paul P. O'Brien, Clerk.

No. 11232

**IN THE
United States Circuit Court of Appeals
For the Ninth Circuit**

**HARRY BLUMENTHAL, LOUIS ABEL,
LAWRENCE B. GOLDSMITH, SAMUEL
S. WEISS and ALBERT FEIGENBAUM,
Appellants,**

vs.

**UNITED STATES OF AMERICA,
Appellee.**

**Upon Appeals from the District Court of the United States
for the Northern District of California,
Southern Division**

**PROCEEDINGS HAD IN THE
UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE NINTH CIRCUIT**

United States Circuit Court of Appeals
for the Ninth Circuit

Excerpt from Proceedings of
Monday, October 14, 1947

Before: Denman, Healy and Bone, Circuit Judges.

[Title of Cause.]

ORDER OF SUBMISSION

Ordered appeals herein argued by Mr. Arthur B. Dunne, counsel for appellant Goldsmith; by Mr. Leo R. Friedman, counsel for appellant Feigenbaum; by Mr. Morris Oppenheim, for appellant Blumenthal; by Mr. George Olshausen, for appellant Abel, and by Mr. Samuel S. Weis, in propria persona, and by Mr. Reynold H. Colvin, Assistant United Attorney, counsel for appellee, and submitted to the court for consideration and decision.

United States Circuit Court of Appeals
for the Ninth Circuit

Excerpt from Proceedings of
Monday, December 16, 1946

Before: Denman, Healy and Bone, Circuit Judges.

[Title of Cause.]

ORDER DIRECTING FILING OF OPINION
AND FILING AND RECORDING OF
JUDGMENT

Ordered that the typewritten opinion this day rendered by this Court in above cause be forth-

with filed by the clerk, and that a judgment be filed and recorded in the minutes of this court in accordance with the opinion rendered.

In the United States Circuit Court of
Appeals for the Ninth Circuit

No. 11,232

Dec. 16, 1946

HARRY BLUMENTHAL, LOUIS ABEL,
LAWRENCE B. GOLDSMITH, SAMUEL
S. WEISS and ALBERT FEIGENBAUM,
Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

Upon Appeals from the District Court of the
United States for the Northern District
of California, Southern Division

Before: Denman, Healy and Bone, Circuit Judges
Bone, Circuit Judge:

OPINION

Appellants appeal from a conviction before a jury upon an indictment charging them, in one count, with the crime of conspiring to violate the Emergency Price Control Act and Regulations by wilfully selling whisky at over-ceiling prices. Omitting formalities, the indictment reads as follows:

"That Harry Blumenthal, Louis Abel, Lawrence B. Goldsmith, Samuel S. Weiss, and Al-

bert Feigenbaum, (hereinafter called 'said defendant') at a time and place to said Grand Jurors unknown, did knowingly, wilfully, unlawfully, corruptly, and feloniously conspire, combine, confederate, arrange, and agree together and with divers other persons, whose names are to the Grand Jurors unknown, to commit offenses against the United States of America and the laws thereof, the offenses being to knowingly, wilfully and unlawfully sell at wholesale certain distilled spirits, to-wit, Old Mr. Boston Rocking Chair Whiskey, in excess of and higher than the maximum price established by law, said maximum price at wholesale then and there being not in excess of \$25.27 per case of twelve bottles, each of said twelve bottles containing one-fifth of one gallon of said Old Mr. Boston Rocking Chair Whiskey, in violation of Section 902(a), 904(a), and 925(b) of Title 50 U.S.C.A. App., and Office of Price Administration Regulations: Maximum Price Regulation 193 and Maximum Price Regulation 445.

"And the said Grand Jurors, upon their oaths aforesaid, do further charge and present: That in pursuance of, and in furtherance of, in execution of, and for the purpose of carrying out, and to effect the object and design and purposes of said conspiracy, combination, confederation, and agreement aforesaid, the hereinafter named defendants did, at the times here-

inafter set forth, commit the following overt acts within the Southern Division of the Northern District of California and within the jurisdiction of this Court: [followed by a recital of alleged overt acts.]”

Appellants assail this indictment on the ground that a conspiracy or agreement to violate a regulation of the Price Administration is specially punishable under the provisions of the Emergency Price Control Act itself as a misdemeanor and therefore cannot be punished as a felony under the general conspiracy statute. They argue that when Congress provided that it should be unlawful to agree to sell or deliver any commodity in violation of any regulation imposed by the Price Administrator, it thereby made a conspiracy to violate a price regulation punishable specially and exclusively as provided in Section 925(b) of the Price Control Act and, therefore, no prosecution would lie under the general conspiracy statute, U.S.C.A. Title 18, Section 88. It is contended that it was the purpose of Congress to do away, in prosecutions under the Price Control Act, with the harsh rule that a conspiracy to commit a misdemeanor is a felony.

The contention lacks merit. The manifest purpose of Congress in enacting the Emergency Price Control Act was to compel compliance with price regulations authorized under the statute. As pointed out in *Kraus & Bros. v. United States*, 327 U. S. 614, 620, 621, criminal liability attaches to any one who wilfully sells commodities in violation of a

regulation or order of the Price Administrator establishing maximum prices. Congress forbade and made punishable an agreement to violate the act, and from this appellants conclude that the conspiracy statute (Title 18 U.S.C.A. 88) was impliedly repealed or superseded by Congress to the extent that it does not apply to conspiracies to violate the Emergency Price Control Act and regulations promulgated thereunder.

We do not agree with this contention. The conspiracy statute includes as a necessary element the commission of an overt act. There is no mention of the overt act in pursuance of the agreement alluded to in the Emergency Price Control Act and we conclude that there is a clear and striking distinction between the mere agreement punishable as a misdemeanor, and the agreement plus an overt act within the purview of the felony statute.

Prosecutions based upon indictments for conspiracies to violate the Emergency Price Control Act have been upheld in *Newman v. United States* (CCA-9), 156 F. 2d 8; *Old Monastery Co. v. United States* (CCA-4), 147 F. 2d 905; *United States v. Renken* (D.C. S.C. 1944), 55 F. Supp. 1; *United States v. Krupnick* (D.C. N.J. 1943), 51 F. Supp. 982; *United States v. Armour & Co. of Delaware* (D.C. Mass., 1943), 50 F. Supp. 347. Furthermore, there has been a long and consistent recognition that the commission of the substantive offense and a conspiracy to commit it are separate and distinct offenses, and the power of Congress to separate the

two and to affix to each a different penalty is well established. A conspiracy to commit a crime is a different offense from the crime that is the object of the conspiracy. See *Pinkerton v. United States*; *American Tobacco Co. v. United States*, Supreme Court, both decided June 10, 1946. See also *Old Monastery Co. v. United States*, *supra*.

On principle and from these authorities, we hold that a conspiracy to violate the Emergency Price Control Act and regulation promulgated thereunder is indictable as a separate and distinct offense.

There was evidence in this case from which the jury could properly have inferred beyond a reasonable doubt:—That Goldsmith operated a wholesale liquor business in San Francisco, California known as the Francisco Distributing Company (hereafter called Francisco) and Weiss was his sales manager; that in December of 1943, two carloads of whiskey (the whisky referred to in the indictment) were received and recorded as purchased by Francisco though exactly who owned the whisky was not established; that this whisky was cased in cases of twelve bottles, each bottle containing one-fifth gallon; that during the months of December of 1943 and January of 1944, and while this whisky was held by Francisco, Abel, Blumenthal and Feigenbaum personally made sales therefrom of cases of whisky at wholesale to various persons, such sales being in lots of from 25 to 200 cases; that when such sales were made, the facilities of Francisco were thereupon used by them for the purpose

of clearing such sales through the books of Francisco with the knowledge and cooperation of Goldsmith and Weiss; that for this particular service Goldsmith and Weiss received two dollars per case which they divided between themselves; that upon the making of such sales by Abel, Blumenthal and Feigenbaum, the whisky was invoiced and billed to each of their customers by Francisco and delivery effected to these customers through Francisco; that such invoices were required by state law to be issued from a legitimate wholesale liquor firm so that their records, as purchasers of whisky, could be properly kept to comply with this law; that Abel, Blumenthal and Feigenbaum were not engaged in business as wholesale liquor dealers and none of them held a basic permit as a wholesaler of liquor; that Abel, Blumenthal and Feigenbaum shared in a common access to the stock or "pool" of whisky so held by Francisco, and each of them was free to and did make sales therefrom to liquor vendors and the liquor so sold by them was thereafter delivered to their customers through Francisco; that in each of these sales the liquor was billed to customers of Abel, Blumenthal and Feigenbaum by Francisco at \$24.50 per case and checks for this amount were given to Francisco; that in each sale so made by Abel, Blumenthal and Feigenbaum, each of them demanded and received a side-money payment from the customer to whom they sold whisky, which side-money payment, when added to the ostensible sale price of \$24.50 per case, brought the price to these customers of Abel, Blumenthal and

Feigenbaum within the range \$55-\$65 per case; that when the checks to Francisco were cleared through its books and the side-money payments collected by Abel, Blumenthal and Feigenbaum, the whisky was delivered by Francisco to these purchasers; that under the Emergency Price Control Act and applicable regulations the authorized wholesale ceiling price on this whiskey was \$25.27 per case at the time these sales were made in the months of December of 1943 and January of 1944.

Appellants vigorously contend that while certain overt acts were shown by the evidence, which might have indicated isolated offenses by individual appellants and punishable as such under the Price Control Act, the evidence was insufficient to show a conspiracy on the part of appellants to commit such offenses. They argue that even though the evidence may have established to the satisfaction of the jury, beyond a reasonable doubt, the truth of the facts as outlined above, nevertheless this proof falls short of creating the necessary inference of guilt legally sufficient to link appellants together as conspirators who had agreed together on a common plan or purpose to do the things shown by the evidence and thereafter engaged in acts designed and intended to carry this plan into execution; that this evidence failed to show (except in some instances) that appellants were acquainted with one another; that it showed only an identity of results rather than an identity of purpose and the latter must be shown in order to establish the existence of a conspiracy; that while

Abel, Blumenthal and Feigenbaum were all conducting the same kind of transaction, no connection was shown between them other than that Goldsmith was the central distributing point from which the whisky was procured; that the independent sales shown to have been made by Abel, Blumenthal and Feigenbaum (and by certain other unknown and unnamed salesmen whose transactions were made to appear in the evidence) present a situation identical to that presented in *United States v. Kotteakus*, (decided June 10, 1946, Supreme Court) in that the evidence showed several distinct transactions participated in by separate and distinct parties, the only "nexus" among them being in the fact that Goldsmith participated in all.

We cannot agree with these contentions. If the jury was convinced beyond a reasonable doubt that the facts and circumstances revealed by the evidence were true, then the jury was justified in inferring that appellants were parties to a single agreement and conspiracy to commit the offenses charged in the indictment and that the overt acts established in the evidence were done and performed by appellants to further and carry into execution the objects and purposes of this conspiracy.

It is true, as argued, that when one conspiracy is charged, proof showing only different and disconnected smaller ones will not sustain conviction, and proof of crime committed by one or more of the defendants, wholly apart from and without relation to others conspiring to do the thing forbidden, will

not sustain conviction. But, as herein indicated, the jury in this case was not confronted with that sort of situation. Here the evidence tended to prove, not a multitude of isolated conspiracies but a single general conspiracy in which the accused cooperated toward the same common end.

Appellants contend that the lower court erred in admitting in evidence certain sales of whisky by Abel, Blumenthal and Feigenbaum to purchasers from them, without first having proved that appellants took part in a conspiracy, that is, until the *corpus delicti* was proved. But the *corpus delicti* itself may be shown to exist by overt acts such as an exchange of words, circumstances and events showing a course of dealings. Any or all of these may provide the basis from which the existence of the conspiracy might be inferred by the jury. Commission of the overt acts may constitute the best proof of the conspiracy and such evidence is often used for that purpose.¹

An overt act need not be in itself a criminal act,² nor the very crime that is the object of the con-

¹*Marino v. U.S.*, 91 F. 2d 691, 698, 9-CCA, cert. den. 302 U. S. 764; *Stack v. U. S.*, 27 F. 2d 16, 17, 9-CCA; *Fisher v. U. S.*, 2 F. 2d 843, 846; *Hoepfel v. U. S.*, 85 F. 2d 237, 242; *Rose v. U. S.*, 149 F. 2d 755, 759, 9-CCA; *American Tobacco Co. v. U. S.*, 147 F. 2d 93, 107; *Glasser v. U. S.*, 315 U. S. 60; *American Tobacco Co. v. U. S.*, (Supreme Court) decided June 10, 1946; *McDonald v. U. C.*, 133 F. 2d 23.

²*Rose v. U. S.*, *supra*; *U. S. v. Rabinowich*, *supra*; *Marino v. U. S.*, *supra* (see note 10 in case).

spiracy. *United States v. Rabinowich*, 238 U. S. 78, 86; *Pierce v. United States*, 252 U. S. 239, 244. It is sufficient that the overt act should accompany or follow the agreement and it must be done in furtherance of the object of it. See *Marino v. United States*, *supra*, notes 12 and 13 in reported case.

In this case the Government relied on circumstantial evidence to show the existence of the conspiracy. The claimed offense is one which from its very nature can rarely be proved by direct evidence. Ordinarily only the results of a conspiracy, and not the private plottings, are observed. Like any other issue of fact conspiracy may be proved by circumstantial evidence. *Rose v. United States*, *supra*. To constitute an unlawful conspiracy no formal agreement is necessary. *Lawlor v. Loewe*, 235 U. S. 522; *American Tobacco v. United States* (Supreme Court, footnote 1). The crime is almost always a matter of inference deduced from the acts of the persons accused, which are done in pursuance of an apparent criminal purpose. *Pearlman v. United States*, 20 F. 2d 113, 114 (cert. den. 275 U. S. 549); *Oliver v. United States*, 121 F. 2d 245, 249; *American Tobacco v. United States*, 147 F. 2d 93, 107. The proof need go no further than reach that degree of probability where the general experience of men suggests that it has passed the mark of reasonable doubt. *Rose v. United States*, *supra*.

Here the circumstances support the inference of a common design. The transaction was coherent, followed by a consistent pattern, and extended over a

relatively brief period of time. It involved quite simply the acquisition of a single large lot of whisky and its sale ostensibly at a uniform below-ceiling price per case to be paid by check, plus the exaction in cash of side-payments as heavy as the traffic would bear; hence the use of solicitors in what was peculiarly a seller's market. Each of the accused men appears as a cog in an enterprise bearing throughout the earmarks of a premeditated scheme in which each actor was to play his appointed role. Superficially all is made to appear regular while beneath the surface the law is flouted to the profit of the participants. To say that there is here no evidence of a conspiracy among the several actors is to deny the lessons of experience.

Furthermore, the order in which evidence to prove the corpus delicti is to be received is largely a matter within the discretion of the trial court. The logical sequence of events—from agreement in a common purpose to perpetuation of an act designed to carry it out—does not require that introduction of the evidence must follow the same rigorous sequence. As pointed out above, commission of an overt act may, in itself, constitute the best proof of the conspiracy. The rule in this circuit is clearly indicated in *Stack v. United States*, supra; *Marino v. United States*, supra; *Rose v. United States*, supra and *Gros v. United States*, 138 F. 2d 261. See also *Hoeppel v. United States*, supra and *McDonald v. United States*, 133 F. 2d 23.

Appellants also contend that the lawful and proper wholesale ceiling price of the whisky was not established by the evidence. They challenge the application at the trial of Maximum Price Regulation 193, Order No. 5 thereunder, and Maximum Price Regulation 445 to determine the lawful wholesale ceiling price of \$25.27 per case on the whisky sold by appellants, and they further contend that Maximum Price Regulation 445 has no application because it was not in effect at the time of the sales.

These contentions are without merit. We find that Maximum Price Regulation 445 was in effect during all of the period covered by the charge in the indictment. Further, that the formula prescribed and required to be applied under these regulations to determine the proper and lawful wholesale ceiling price of \$25.27 per case was clearly expressed by the Price Administrator and the dividing line between unlawful evasion and lawful action was not left to conjecture. The lawful price can be clearly ascertained from the regulations and it was properly applied by the lower court in its instructions to the jury.

It is also urged by appellants that these regulations are void because their requirements are so vague, indefinite and uncertain that the wit of man is incapable of understanding them. We disagree. The challenged regulations are free from the claimed infirmities. It is significant that the records required to be kept on sales of whisky referred to in the indictment were made to show an invoiced whole-

sale price (not including the illegally collected "side-payments") of \$24.50 per case. The adoption and use of this "wholesale price" on such sales records revealed a knowledge and understanding of the wholesale price requirements of the applicable regulations sufficient to present to the jury a clear inference that the studied purpose of the appellant-sellers was to make this invoice price come within the lawful wholesale ceiling price of \$25.27 per case in order that such recorded sales would appear to conform to the price requirements of the very regulations and the order which appellants here characterize and denounce as being so vague and uncertain, as to be incomprehensible.

Appellants also assert the invalidity of the regulations. The same argument was asserted in *Old Monastery v. United States*, *supra*. The same regulations were there involved and the court found no merit in the contention. The *Yakus* case (321 U. S. 414) lays at rest the question of appellants' right to attack the validity of such regulations in this proceeding. There is an adequate separate procedure available for the adjudication of the validity of administrative regulations when questioned, even in criminal cases. The record shows no attempt by appellants to employ the procedure referred to in the *Yakus* case, and in view of the rule there laid down, we hold that appellants' challenge to the validity of the regulations and Order No. 5 cannot here be considered.

The contention that the evidence showed that ap-

pellants who sold the whisky were "finders" for the purchasers is without merit. The evidence clearly permitted a convincing inference to the contrary and it satisfied the jury, beyond a reasonable doubt, that where sales were established as having been made by Abel, Blumenthal and Feigenbaum to certain buyers from them, they were sellers in these transactions and not "buying agents" for these purchasers.

One Harkins, a special investigator for the Alcohol Tax Unit of the Treasury Department, testified concerning the details of an interview he had with Goldsmith and his sales manager, Weiss, during January of 1944. (Harkins appears to have had a later interview with these two appellants in September of 1944 regarding the same matter.) He had been checking on the sales of the whisky here involved. In these conversations, these appellants told Harkins ~~of the receipt by them of the two carloads of whisky~~ and stated to him that they had received a fee of \$2 a case for clearing the whisky through the books of the Francisco.

Objection was made by appellants to the Harkins testimony on the ground that it was not binding on any of them except Goldsmith and Weiss; that the September interview was after the conclusion of the alleged conspiracy and was a narrative of past events; that it was hearsay, and that the corpus delicti had not been established. At the conclusion of the testimony, the court instructed the jury that the statements made by Goldsmith and Weiss to Hark-

ins could only be considered as against Goldsmith and Weiss. The instruction was proper. *Chevillard v. United States*, 155 F. 2d 929, 9-CCA.

Aside from the Harkins testimony directly affecting the activities of Goldsmith and Weiss, there was ample evidence of active participation in the conspiracy charged to sustain, beyond a reasonable doubt, an inference of guilt of Abel, Blumenthal and Feigenbaum, the other three appellants. This evidence also fully sustains the inference that the sales of whisky by Abel, Blumenthal and Feigenbaum were made by them and delivery to their customers accomplished by means of the cooperation and participation of Goldsmith and Weiss in this sales scheme. Such a conclusion is clearly supported by reasonable inferences to be drawn from the evidence.

Another contention is that since the court below admitted the testimony of each witness against only a particular defendant with whom he dealt, and awaited the motion of the Government at the close of its case to admit all of the testimony against all of the defendants³ upon the ground that a conspiracy had been established among them, they were deprived of the right of cross-examination—this because they could not cross-examine at the time of such limited admission without waiving its limitation. They argue that this situation gave them no

³This motion was granted except with respect to the testimony of Harkins which was admitted only against Goldsmith and Weiss.

opportunity to cross-examine later in the trial and prior to the granting of the Government's motion. The record does not support them in this contention. Their objections at trial reveal no protest against a deprivation of the claimed right. No demand to cross-examine was made at the time of the granting of the Government's motion. See *Levine v. United States*, 79 F. 2d 364, 368, 9-CCA.

An exception was noted by appellants to that portion of the charge to the jury which informed the jury that in every crime there must exist a union or joint operation of act and intent, and for conviction both elements must be proved to a moral certainty and beyond a reasonable doubt; that such intent is merely the purpose or willingness to commit such an act; that a person is presumed to intend to do all that which he voluntarily and wilfully does in fact do, and must also be presumed to intend all the natural, probable and usual consequences of all his acts.

We find nothing objectionable in this instruction. See *United States v. General Motors*, 121 F. 2d 376, at 402; *Gates v. United States*, 122 F. 2d 571, 575.

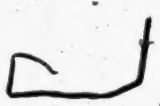
We have examined this record with care to assure ourselves that substantial rights of appellants (who did not testify) have not been invaded by the wrongful admission of evidence and by the instructions to the jury. The instructions adequately informed the jury concerning the weight to be given circumstantial evidence and the necessity of receiving with caution the testimony of an accomplice or co-con-

spirator; the quantum and character of proof necessary to establish the existence of a conspiracy; the element of reasonable doubt regarding the guilt of any one of the appellants, and the necessity of applying the rule of reasonable doubt to every material element of the events charged in the indictment. The rule of proof as to the establishment of the commission of overt acts was properly stated. From our examination we are satisfied that the instructions, taken as a whole, correctly presented the law to the jury.

The evidence admitted in this case supports the verdict. It convinced the jury beyond a reasonable doubt that appellants were active participants in a single conspiracy the purpose and result of which was the deliberate use of the black-market side-payment device to violate the Emergency Price Control Act.

Affirmed.

(Endorsed:) Opinion. Filed Dec. 16, 1946. Paul P. O'Brien, Clerk.



In the United States Circuit Court of Appeals for
the Ninth Circuit

No. 11,232

HARRY BLUMENTHAL, LOUIS ABEL,
LAWRENCE B. GOLDSMITH, SAMUEL S.
WEISS and ALBERT FEIGENBAUM,
Appellants,

vs.

UNITED STATES OF AMERICA,
Appellee.

ORDER

On Petition for Rehearing

Before: Denman, Healy and Bone, Circuit Judges

The petition for rehearing is denied.

WILLIAM HEALY,

United States Circuit Judge.

HOMER T. BONE,

United States Circuit Judge.

Denman, Circuit Judge, dissenting:

The petition for rehearing should be granted and the judgments reversed. My concurrence in the decision is withdrawn and the accompanying opinion filed as a dissent to the court's opinion filed on December 16, 1946.

(Endorsed:) Order denying petition for rehearing, and Dissenting Memorandum of Denman, C.J. Filed February 28, 1947. Paul P. O'Brien, Clerk.

[Title of Circuit Court of Appeals and Cause.]

DISSENTING OPINION

Upon Appeals from the District Court of the United States for the Northern District of California, Southern Division

Before: Denman, Healy and Bone, Circuit Judges
Denman, Circuit Judge, dissenting from
opinion of the court filed herein on December 16, 1946:

The statement of facts of the court's opinion has a fatal vacuum necessary to be filled to establish the conspiracy charged, though its circumstantial evidence warrants the inference of at least four other disconnected criminal conspiracies.

Abel, Blumenthal and Feigenbaum are shown to have been black marketers and should have been prosecuted for selling whisky at over ceiling prices. Instead, the several prosecutions are sought to be avoided by attempting to throw a conspiracy net around them—a convenience to prosecutors but often dangerous to the cause of justice. Cf. *Kotteakos v. United States*, 328 U. S. ..., 90 L. ed. 1178, 1183.

The court's opinion is bare of facts, as is the evidence,

(1) That any of these three knew or was in any communication with any others of them;

(2) That any knew that any other obtained whisky from the defendants Goldsmith and Weiss;

(3) That any of the three sellers knew that any other of them bought the whiskey from the so-called

"common pool" of whiskey in the warehouse—a common pool only in the sense that each separately obtained his whiskey from it, but not a pool of which any of the three had common knowledge that any other of them had obtained his whiskey from it;

(4) That any knew that any other bought his whiskey at the same below-ceiling price;

(5) That any knew that any other sold his whiskey at the same or similar over-ceiling prices.

The obvious inference from the above proof and absence of other proof is that the unknown owner of the whiskey referred to in the court's opinion used each of Abel, Blumenthal and Feigenbaum separately as his agent to violate the law. This would constitute several separate conspiracies between the unproved owner and each of the proved sellers, but not a conspiracy among all four of them.

The owner is the common hub from which extend the three illicit sale conspiracies as spokes, but with no binding rim, as in the cases of *Kotteakos v. United States*, 328 U. S. . . , 90 L. ed. 1178, 1181, and *Canella v. United States*, 157 F. 2d 470, 477.

Even if the circumstantial evidence of identity of purchase and sale price also warranted the more remote inference that each of these three sellers conspired with each other and the owner to violate the price ceiling, the first and obvious inference, of three separate agencies for the owner, must control. As we stated in reversing an instruction which failed to state that the inferences from circumstan-

tial evidence must be "inconsistent with every reasonable hypothesis of innocence," of the crime charged. *Paddock v. United States*, (CCA-9) 79 F. 2d 872, 875, 876.

"These instructions were erroneous. The rule with reference to the consideration of circumstantial evidence by the jury is thoroughly settled. This rule in brief is that the circumstances shown must not only be consistent with guilt, but inconsistent with every reasonable hypothesis of innocence. 2 *Brickwood Sackett Instructions to Juries*, § 2491, et seq. We have said that this well-settled instruction in regard to the degree of proof required where circumstantial evidence is relied upon is merely another statement of the doctrine of reasonable doubt as applied to circumstantial evidence. It may therefore be true that 'no greater degree of certainty is required when circumstantial evidence is relied upon than where direct evidence is relied upon,' as stated by the trial judge. The additional statement in the instruction that 'evidence about circumstances * * * must at all times be consistent with guilt only and inconsistent with innocence,' omits the qualifying and important phrase, 'inconsistent with every reasonable hypothesis of innocence,' and for that reason is an erroneous statement of the law."

The same is true also of the appellants Weiss and Goldsmith. The conspiracy charged is that they conspired with the three black marketers, Abel,

Blumenthal and Feigenbaum to sell the whiskey at higher than the maximum price. The court's opinion states no facts and the record has none showing that either Weiss or Goldsmith knew that any whiskey was sold at such higher prices, much less than there was any agreement with the three or any one of them for such prohibited sales.

There is evidence that Weiss and Goldsmith received \$2.00 per case to pass the whiskey through their books and to sell it at slightly less than the maximum price to cover up some unknown reason of the unknown owner. But this is fully capable of supporting an inference that the unknown owner has highjacked the whiskey and wanted it sold at something less than the maximum so that no question could be raised regarding its disposition. True this would be a wrongful conspiracy, but as in the Kotteakos case, not the conspiracy charged in the instant indictment. As in *Paddock v. United States*, supra, the inference from the circumstantial evidence of these wrongful acts involving sales at less than the maximum is one "inconsistent with . . . [a] reasonable hypothesis of innocence" of the charged conspiracy to sell at higher than the maximum price. As is stated in *Kotteakos v. United States*, supra; at page 1191,

"Criminal they may be, but it is not the criminality of mass conspiracy. They do not invite mass trial by their conduct. Nor does our system tolerate it. That way lies the drift toward totalitarian institutions. True, this may be in-

convenient for prosecution. But our Government is not one of mere convenience or efficiency. It too has a stake, with every citizen, in his being afforded our historic individual protections, including those surrounding criminal trials. About them we dare not become careless or complacent when that fashion has become rampant over the earth."

The judgments should have been reversed.

(Endorsed:) Dissenting Opinion of Denman, C.J. Filed February 28, 1947. Paul P. O'Brien, Clerk.

United States Circuit Court of Appeals for the
Ninth Circuit

No. 11232

HARRY BLUMENTHAL, et al.,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

JUDGMENT

Upon appeal from the District Court of the United States for the Northern District of California, Southern Division.

This cause came on to be heard on the Transcript of the Record from the District Court of the United States for the Northern District of California, Southern Division and was duly submitted.

On consideration whereof, It is now here ordered and adjudged by this Court, that the judgments of the said District Court in this Cause, be and, and each of them, hereby is affirmed.

[Endorsed]: Filed and entered December 16, 1946.
Paul P. O'Brien, Clerk.

United States Circuit Court of Appeals for the
Ninth Circuit

Except from Proceedings of Friday,
February 28, 1947.

Before: Denman, Healy and Bone, Circuit Judges.

[Title of Cause.]

**ORDER DENYING PETITION FOR REHEAR-
ING, WITHDRAWING CONCURRENCE
AND FILING OF DISSENTING OPINION**

Upon consideration of the respective petitions of appellants Blumenthal, Abel, Goldsmith, Weiss and Feigenbaum, filed January 14, 1947, and within time allowed therefor by rule of court, for a rehearing of above cause, and by direction of Circuit Judges Healy and Bone, It is ordered that said petitions for rehearing, and each of them hereby is denied.

Circuit Judge Denman dissents from denial of the petitions for rehearing and withdraws his concurrence in the judgment of affirmance filed and entered on December 16, 1946, and directs that his dissenting opinion to the opinion of December 16, 1946, be forthwith filed by the clerk.

United States Circuit Court of Appeals for the
Ninth Circuit

[Title of Cause.]

**CERTIFICATE OF CLERK, U. S. CIRCUIT
COURT OF APPEALS FOR THE NINTH
CIRCUIT, TO RECORD CERTIFIED UN-
DER RULE 38 OF THE REVISED RULES
OF THE SUPREME COURT OF THE
UNITED STATES.**

I, Paul P. O'Brien, as Clerk of the United States Circuit Court of Appeals for the Ninth Circuit, do hereby certify the foregoing Five Hundred Five (505) pages, numbered from and including 1 to and including 505, to be a full, true and correct copy of the entire record excluding original exhibits of the above-entitled case in the said Circuit Court of Appeals, made pursuant to request of counsel for the appellants, and certified under Rule 38 of the Revised Rules of the Supreme Court of the United States, as the originals thereof remain on file and appear of record in my office.

Attest my hand the seal of the said United States Circuit Court of Appeals for the Ninth Circuit, at the City of San Francisco, in the State of California, this 7th day of March, 1947.

[Seal]

PAUL P. O'BRIEN,
Clerk.

SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1947

No. 54

ORDER ALLOWING CERTIORARI—Filed May 5, 1947

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Ninth Circuit is granted, and the case is consolidated with Goldsmith et al. vs. United States for argument.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1947

No. 55

LAWRENCE B. GOLDSMITH, Petitioner,

vs.

THE UNITED STATES OF AMERICA

ORDER ALLOWING CERTIORARI—Filed May 5, 1947

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Ninth Circuit is granted, and the case is consolidated with Blumenthal et al. vs. United States for argument.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ:

SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1947

No. 56

ORDER ALLOWING CERTIORARI—Filed May 5, 1947

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Ninth Circuit is granted, and the case is consolidated with Blumenthal et al. vs. United States for argument.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1947

No. 57

ORDER ALLOWING CERTIORARI—Filed May 5, 1947

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Ninth Circuit is granted, and the case is consolidated with *Blumenthal et al. vs. United States* for argument.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

(1394)

In the Supreme Court

OF THE
United States

OCTOBER TERM, 1946

No. 1162

HARRY BLUMENTHAL,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION OF HARRY BLUMENTHAL FOR A WRIT OF CERTIORARI

To the United States Circuit Court of Appeals
for the Ninth Circuit,

and

BRIEF IN SUPPORT THEREOF.

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In the Supreme Court

**OF THE
United States**

OCTOBER TERM, 1946

No.

HARRY BLUMENTHAL,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION OF HARRY BLUMENTHAL FOR A WRIT OF CERTIORARI

**To the United States Circuit Court of Appeals
for the Ninth Circuit.**

*To the Honorable Fred M. Vinson, Chief Justice of
the United States, and to the Honorable Associate
Justices of the Supreme Court of the United
States:*

The petition of Harry Blumenthal for a Writ of
Certiorari to the United States Circuit Court of Ap-
peals for the Ninth Circuit, respectfully shows to
Your Honors:

SUMMARY AND SHORT STATEMENT OF THE MATTER INVOLVED

At the November, 1944, term of the Southern Division of the United States District Court for the Northern District of California, the grand jurors presented an indictment charging that the petitioner Harry Blumenthal and Louis Abel, Lawrence B. Goldsmith, Samuel S. Weiss and Albert Feigenbaum

"at a time and place to said grand jurors unknown, did knowingly, wilfully, unlawfully, corruptly, and feloniously conspire, combine, confederate, arrange, and agree together and with divers other persons, whose names are to the Grand Jurors unknown, to commit offenses against the United States of America and the laws thereof, the offenses being to knowingly, wilfully and unlawfully sell at wholesale certain distilled spirits, to-wit, Old Mr. Boston Rocking Chair Whiskey, in excess of and higher than the maximum price established by law, said maximum price at wholesale then and there being not in excess of \$25.27 per case of twelve bottles, each of said twelve bottles containing one-fifth of one gallon of said Old Mr. Boston Rocking Chair Whiskey, in violation of Section 902(a), 904(a), and 925(b) of Title 50 U.S.C.A. App., and Office of Price Administration Regulations: Maximum Price Regulation 195 and Maximum Price Regulation 445."

As overt acts in furtherance of the conspiracy, the indictment alleges certain transactions which it is unnecessary to set forth. (Transcript of Record, p. 3, et seq.)

When called up to plead to this indictment, the appellant and petitioner Harry Blumenthal presented and filed a demurrer to the indictment. (T.R. 11-16.)

Subsequent to the filing of the demurrer and before the ruling of the Court thereon, Blumenthal presented and filed a motion to quash the indictment. (T.R. p. 16.)

On April 2, 1945, the District Court overruled the demurrer and denied the motion to quash, the appellant duly excepting to these rulings.

On May 15, 1945, the case came on regularly for trial before Honorable Louis E. Goodman, United States District Judge, with a jury. The evidence, the substance of which is set forth in the bill of exceptions, is not directed to the proof of the offense charged against the defendants, to-wit, conspiracy, but consists entirely of testimony and documentary evidence relating to isolated transactions in no way connected with each other. There is no proof that any two of the defendants ever acted in concert with each other, Judge Denman of the Circuit Court of Appeals bases his dissenting opinion, from which we shall presently quote, upon this utter failure of proof. There is no proof that any one of the defendants ever met or communicated either verbally or in writing, either directly or indirectly, with any other defendant. There is no evidence that at any time mentioned in the indictment, or before, or after, any one of the defendants even knew of the existence

of any of the others. These observations apply with peculiar force to Blumenthal.

Yet, solely for the reason that the defendants engaged in similar transactions, unrelated as these transactions were to each other, the Government asked the jury to draw the inference that there was a conspiracy, and the learned trial judge erroneously, as we shall presently show, ruled that there was enough evidence to warrant the submission of the case to the jury.

To the end that we may demonstrate that there is not even a scintilla of evidence tending to show, either directly or by any reasonable inference that might be drawn therefrom, that Harry Blumenthal was a party to the conspiracy charged in the indictment or any other conspiracy, we shall set forth the substance of the evidence in so far as it relates to him.

The first time that the appellant Blumenthal appears in the record, is during the direct examination of the witness James Cernusco, who testified that he had made a purchase of the brand of liquor mentioned in the indictment from a man who said he came from the Francisco Distributing Company, a wholesale liquor house. He gave this man two checks payable to the Francisco Distributing Company for \$450 and \$2000 respectively. The witness also gave this unidentified individual \$6100 in cash. (T.R. 313 *et seq.*)

This testimony was repeatedly objected to by counsel for the appellant Blumenthal on the ground that it was hearsay, and not binding upon him. Toward the close of his direct examination, the witness testified: "I do not know Harry Blumenthal." (T.R. 307.)

On cross-examination Blumenthal stood up at the request of his counsel and the witness stated, "I do not know this gentleman. I never did any Old Rocking Chair business with him." (T.R. 307.)

The first witness who testified that he ever saw Blumenthal, or had any conversation or transaction with him, is Angelo Lombardi, whose testimony is in substance as follows:

"I am a tavern owner in Santa Rosa, and have operated that tavern since 1940, and was engaged in the operation of that tavern during December, 1943, and January, 1944. During those months I purchased 100 cases of 'Old Mr. Boston Rocking Chair Whiskey.' I did not give both check and cash to the same party. I paid cash for the whiskey to a fellow in The Sportorium on Third Street, between Mission and Market. I see that man in the courtroom, the man with the glasses, sitting down. (T.R. 353.)

(The witness identified the defendant Blumenthal.)

The Witness (continuing). I paid \$3050 in cash to Mr. Blumenthal. It was between the 15th or 18th, somewhere around in there. I don't quite remember the date. I have brought invoices with me. I bought

100 cases of whiskey. About the 15th Mr. Minkler contacted me about the whiskey. Mr. Minkler was a tavern owner at Santa Rosa. He contacted me at my place of business. We went to San Francisco, and we bought this whiskey around the 18th of December. The first time we went to The Sportorium, I went to The Sportorium with Mr. Minkler. I did not see Mr. Blumenthal at The Sportorium the first time. I went into the Sportorium and Mr. Minkler went and talked to somebody and I stayed in front there looking at some fishing poles and things he had. Mr. Minkler went in the back room there. I didn't pay any attention. (T.R. 354.)

(To the Court). I did not see this man I was with talk to Mr. Blumenthal on that occasion. On that occasion I did not have any conversation with Blumenthal. After Mr. Minkler came out of this room, he said they got in contact with somebody and the whiskey was O.K. Then Minkler and I went back to Santa Rosa. We next came to San Francisco around the 20th of December. I am not exactly sure about the date. Around the 20th of December I came to San Francisco with Minkler. I went to The Sportorium with \$3050 in cash. On that occasion I saw Blumenthal at The Sportorium. All three of us went together in the back room and paid the money to Mr. Blumenthal, laid it right on the shelf. No one else was in the back room beside Blumenthal and Mr. Minkler and myself. At that time I did not have any conversation with Mr. Blumenthal. I did not say anything as I gave him the money. I was

just leaving it all up to Minkler. I don't know whether Minkler said anything. I left, and they talked a little while. We left. They said, 'The whiskey will be up there in a few days.' Mr. Minkler said that. I went back to Santa Rosa with him. (T.R. 355.)

Q. What happened back at Santa Rosa regarding this transaction?

Counsel for the defendant Blumenthal objected to the question as hearsay and not binding on the defendant Blumenthal. The Court overruled the objection to which ruling counsel for the defendant Blumenthal excepted. (T.R. 355.)

The Witness (continuing). * * * We just left there; and Minkler went back to his own place of business and I went back to mine, and about 2 or 3 days after, he called up and says that the whiskey was on its way.

Counsel for the defendant Blumenthal objected to this evidence and to anything that happened between Minkler and the witness. The Court overruled the objection, to which ruling counsel for the defendant Blumenthal excepted. (T.R. 355.)

The Witness (continuing). I received a phone call from Minkler. He said, 'The whiskey will be up in a few days.' About Friday the whiskey arrived, 100 cases, by Sonoma-Marin Freight Company. That is my signature on the check for \$2450 shown me. I wrote the check out and delivered it to the name on

there, Clyde Minkler. I wrote the check for \$2450 at the instructions of Clyde Minkler.

I have seen the invoice now shown me of the Francisco Distributing Company, No. 10147-A. That came in about the first of January, in the mail. It was in the complete form that it is now, when I received it. The words 'Salesman Weiss' were on there when I received the document. I noticed them at the time. Since that time this document has been part of the files and records of my business. The records are kept by himself. (T.R. 356.)

The Witness (continuing). I received 100 cases of fifths of American Distillers Rocking Chair, Mr. Boston, blended bourbon about the 3d of January. I had no further transaction regarding the purchase of this whiskey. I last saw Mr. Minkler about last November. He sold out and went to New Mexico or some place. I have not seen him since approximately last November." (T.R. 356.)

Herman Fingerhut, the owner of a cafe in Vallejo, testified:

"During the months of December, 1943 and January, 1944 I purchased some Old Mr. Boston Rocking Chair Whiskey. I don't know the man's name from whom I purchased the whiskey at that time. I went to The Sportorium and contacted the man there. The place where I purchased this whiskey was The Sportorium. (T.R. 362.) I don't know the exact day, the first time I went in there, but I imagine it was the first part of December. I paid \$55 a case for this

whiskey. As close as I remember, I first went to The Sportorium about the 3d or 4th of December. I seen a man there—I don't know his name. I think it is that man in the last row there, something similar to that man. I am referring to that man with the brown suit.

(To the Court). Mr. Blumenthal is the man I have in mind. That was the man I saw. On the occasion of my first visit to The Sportorium I went alone. I had a conversation with that man on that occasion. Just the two of us were present at the conversation. I imagine it was the early part of the afternoon. The conversation was regarding some whiskey. At that time I didn't know what kind of whiskey. All I knew I could get some whiskey. What it was I don't remember. I was not told. I told him I needed some whiskey. He told me he could probably get it for me. I said I could use some, and he asked me how many cases I could use. I said at the time around 200 cases. He said well, he could take care of me. He told me the price was \$55. I had to pay \$24.50 a case and make out a check for that and the rest was in cash. He told me he didn't know exactly when I could get the whiskey. He said he will get it in the latter part of the month, as soon as it comes in, if he would let me know. I had no conversation with him about the check, outside of him telling me to make out a check. The first check I made out was for \$2000. I did not make it out on the occasion of my first visit. The first time there was no mention about a check at all, because the

first time I went to see him I did not know whether I could buy the merchandise, because it was too much money for me to pay. That is the only conversation we had the first time. He didn't say he would get in touch with me. He did not say to come back. I went home, and I told him if I decided I wanted to buy it, I would come back and see him. There was no further conversation the first time. Pursuant to that conversation I went back, I imagine 3 or 4 days after that, maybe a week; I don't know exactly. That would be something like the second week in December. Nobody went with me. On the second visit I went to The Sportorium on Third and Stevenson. I went alone. (T.R. 363.) I know where Market Street is in San Francisco; The Sportorium is one short block away from it. It is right on the corner of Stevenson and Third. On this second visit to The Sportorium I saw Mr. Blumenthal. I had a conversation with him regarding this whiskey. Just him and I was present. This was early in the afternoon. The conversation took place in the back of The Sportorium. I told him 'I am ready to buy some of that whiskey' but I could not handle 200 at the time, I could only handle 100, but I knew somebody who would take the other hundred cases. (T.R. 363-364.) He said that was all right. There was no other conversation, outside I told him who the other party was, a man by the name of Walter Travis. I didn't know what kind of whiskey it was going to be at that time. It was going to be a blend. He told me the whiskey was going to arrive about the end

of the month. He did not know exactly. There wasn't much said outside I told him I was going to take a 100, and Travis was going to take the other hundred, and then I give him a deposit on it of \$4000 in the form of four one-thousand-dollar bills, which I got from the Bank of America right on Powell and Market, I think; I don't know exactly where. At that time he said he wanted cash now and the check would come a little later. He did not give me any instructions then regarding the writing of the check. The total cash payment from that conversation was \$4000 then; I paid him \$4000 the second time and I think we were supposed to pay him some more money later on. I was not taking 200 cases, I only took 100, so it only cost me \$4000, and I think Mr. Travis gave him money later on, I believe. When I gave him the \$4000, I said it was for 200 cases at that time. That conversation took a couple of minutes. (T.R. 364.)

(To the Court). All that transpired was I gave him \$4000 in cash at that meeting. I had another meeting later on. Mr. Travis and myself were present at that meeting, which was a few days later, I think. I told him Mr. Travis was taking the other hundred. (T.R. 365.)

(To the Court). I won't say for sure I saw Mr. Travis pass over the money. All I do know is I said that Mr. Travis was going to take the other hundred and I was going to take that hundred, that's all. The third time I gave Mr. Blumenthal a check for \$2000. He told me to make it out to the Francisco

Distributing Company for \$2000. That one hundred cases of whiskey was delivered to me. (T.R. 365.) The 200 cases were delivered in one place, in Mr. Travis' warehouse, and I went and got my hundred from the warehouse. That was Old Mr. Boston Rocking Chair whiskey. This invoice of the Francisco Distributing Company (marked U. S. Exhibit 52 for identification) came into my possession before I got the whiskey. I got this from the man at The Sportorium, after I give him the \$2000; he give me this and I owed him the balance of \$450.

(To the Court). I paid that on a check; the \$450 was in a check to the Francisco Distributing Company. I don't know about this 'G' with a line under it on the face of that document.

(To the Court). I didn't put it on after I got it. It is in the same condition as when I first got it. I made a later purchase of Old Mr. Boston Rocking Chair Whiskey about the 3rd or 4th of January. (T.R. 365.) I purchased that whiskey from the same place and from the same man. I bought 25 cases. I paid for that whiskey \$55 a case. I received that whiskey about a week later. I think a week or two later, I don't remember exactly. Mr. Travis give me an invoice of the Francisco Distributing Company, now shown me, No. 10151, which is now shown me. I don't know where he got it, but he give it to me as soon as he come back from the city.

The Witness (continuing). That invoice arrived before I received the 25 cases of whiskey. The 25

cases of whiskey came together with—there was 100 altogether, and Travis got 75 and I got 25. I don't know the exact date when that did come. He received it. I give my money to Mr. Travis to bring down, because I didn't come down to San Francisco anymore.

(To the Court). I talked with Mr. Blumenthal about buying 25 cases. I don't remember the exact date. All I know is I got a telephone call wanting to know if I needed any more whiskey.

The check now shown me (U. S. Exhibit 54, marked for identification) on the Bank of America, Vallejo Branch, for \$4000, payable to 'Cash', is in my handwriting. I signed it myself. I made it out at the bank. I think the one on Powell and Market, Bank of America. It is marked here, 'November 24'. I cashed it in, and got \$4000 for it. That is the \$4000 to which I have referred. The date of that was November 24, 1943. I made out the check now shown me dated December 9, 1943. That is my signature that appears thereon. I made that out at The Sportorium on December 9, at the instruction of the man who was with me. He told me to make the check payable to the Francisco Distributing Company, for \$2,000. Mr. Travis was with me at that time. At the time I gave the check to Mr. Blumenthal for \$2,000, I gave him \$1,050 in cash. (T.R. 367.)

I made out the Bank of America check now shown me, dated December 12, 1943. That is my signature thereon. I made that check out at home. I mailed

it to the Francisco Distributing Company at the direction of the man from The Sportorium. There was a balance of \$450, and I was told to mail that later on. I don't think he told me what date. I received the invoice of the Francisco Distributing Company (U. S. Exhibit 52 for identification) from the man at The Sportorium. I believe he wrote that 'Received \$2000' and 'Balance \$450.' When he handed me this invoice he said, 'you just owe \$450, and that is all at this time.' That was not the time he told me write that \$2000 check—the \$450—no. I don't know just when he told me to write it. I wouldn't say for sure. I paid no more money in any way than that which we have named for the first 100 cases that I bought during the month of December. The Bank of America check now shown me to Francisco Distributing Co. for \$612, I wrote out at home. That is my signature that appears thereon. I wrote it about December 30, I believe, at home. After I wrote the check I gave it to Mr. Travers (Travis). I gave Mr. Travis some cash. I don't remember how much right now. The difference between that and \$24.50 and \$55—this check is made out for 25 cases at \$24.50 a case, and the whiskey cost \$55, and the difference I gave him in cash. (T.R. 368.)

Walter H. Travis, another witness called by the Government, testified:

"I am a tavern owner. The name of my tavern at that time was Lou's Place, 717 Sonoma Street, Vallejo. I operated that place during the months

of December 1943 and January 1944. During that time I purchased some Old Mr. Boston Rocking Chair Whiskey from a gentleman in The Sportorium on Third Street. I see that gentleman here, in the court-room (pointing out the defendant Blumenthal). I bought 175 cases of Old Mr. Boston Rocking Chair Whiskey from Mr. Blumenthal. I bought those in separate parcels twice. I bought 100 cases on the first occasion, I paid \$55 a case, \$5500 for that whiskey. I recognize Government's for Identification No. 44, check for \$2000. That is my check. I wrote it, and that is my signature. After I wrote it I carried it to The Sportorium on Third Street in San Francisco. I did not write it in The Sportorium. I carried it in there. I wrote the check about December 9. I was told to make it out to the Francisco Distributing Company by the gentleman at The Sportorium. (T.R. 373.) No part of the check was written in The Sportorium. That check was not written at the time of my first visit to The Sportorium. It was written the second. The date of my first visit to The Sportorium was somewhere around the 9th of December. Mr. Fingerhut went with me on that occasion. 'Government's for Identification No. 55' is not my check. I did not write any of Government's for Identification No. 44, check for \$2000, at The Sportorium. I wrote that check at my office in Vallejo about the 9th of December. I don't know that there was anyone present beside myself when I wrote the check. Mr. Fingerhut told me to write that check. That check was entirely made out

when I arrived at The Sportorium. When I took the check and the money I had a conversation with Mr. Blumenthal on that occasion. That was the occasion of the 9th to which I have just referred. That was the occasion of my first visit; no one else was present at that conversation beside myself and Mr. Fingerhut and Mr. Blumenthal. It was just before noon. The conversation was that we come and pay the money to get delivery of the whiskey. The name of the whiskey was mentioned, I think. I think it was named; we could get 100 cases of Rocking Chair Whiskey that was what was said. We was to send him a check for \$450. Mr. Blumenthal said that he told me to send the check to The Sportorium. I had to take \$1050 down at the time I took this check. He just said that we would have to pay \$2450 for the 100 cases by check to the Francisco Distributing and the \$1050 to him in cash. On the occasion of that conversation I gave \$1050 to Mr. Blumenthal. I did not have any further conversation with him at that time. I have seen that check for \$450, Government's for Identification No. 43. That is my check. I wrote it at my office. That is my signature. I mailed it to Mr. Blumenthal to The Sportorium. I have seen this Francisco Distributing Company invoice No. 10086. I saw that for the first time when I delivered the check and the money. That was on the occasion of my first visit to The Sportorium. Mr. Blumenthal gave me that invoice. He wrote this '\$2000, balance \$450.' He wrote that in my presence, 'Received on account

\$2000; balance due \$450.' Since that time this invoice has been part of the files of my business. I keep them in my custody. (T.R. 375.)

The foregoing constitutes the only evidence produced by the Government affecting Blumenthal in any manner whatsoever.

A great mass of evidence, however, was admitted over the repeated objections of petitioner on the ground that the same was not binding as to him, relating to transactions in which the other defendants were involved. No pretense was made that this appellant participated in any of these transactions, and the learned trial judge, during the course of the trial, specifically limited the scope of such evidence, and admitted it solely as against the defendant to whom it related.

At the conclusion of the Government's evidence a most unusual proceeding, and one the like of which we have never heard before, was adopted by the United States Attorney. He made a motion (T.R. 390-391) to admit all of the testimony that had been taken and all of the documents that had been received either in evidence or for identification, against all of the defendants. This motion was strenuously resisted by counsel for the defendants. Mr. Friedman, who appeared as counsel for the defendant Feigenbaum, objected to each and every bit and portion of this evidence, stating specific grounds therefor, and when his objection was overruled by the Court, made a motion to strike out all of

this evidence. (T.R. 392-409.) The petitioner, as well as all of the other defendants, joined in Mr. Friedman's objection, and in a motion to strike, which was likewise denied by the trial judge, and exceptions noted. (T.R. 410.). The proceedings upon this motion of the United States attorney, the objections thereto, and the motion to strike out the evidence objected to, are set forth in full in the transcript, under appellant Feigenbaum's Assignment of Errors XVII (T.R. 106, *et seq.*), also in the Bill of Exceptions. (T.R. 391-421.) They need not be reiterated here. It is sufficient to state that the chief and all-important point in the objections was that the *corpus delicti* had not been proven, because there was no evidence tending to establish the formation or existence of any conspiracy, and that, accordingly, any acts or declarations of the alleged conspirators were inadmissible, not only as against the other defendants, but even as to the defendant to whom they related.

All of these objections were overruled; and all of the said motions denied by the trial Court, with the single exception heretofore noted, that the testimony of the witness Harkins was admitted only as against the defendants Weiss and Goldsmith.

Thus, evidence which had been originally admitted as against only one defendant was summarily received as evidence against all the other defendants, whose counsel, relying upon the original limitations which specifically held the evidence not admissible against their respective clients, had refrained from

cross-examining the witness. The unfairness of this procedure, which was in effect a denial of the right of cross-examination, is palpable, at first blush, but we reserve further comments thereon to the portion of the supporting brief which will be devoted to the argument.

At the conclusion of all the evidence, counsel for the petitioner Blumenthal moved the Court for an instructed verdict of "Not Guilty". This motion was denied and an exception taken. (T.R. 424-427.)

Thereafter the cause was argued by counsel, the Court delivered its charge (T.R. 429, *et seq.*), and the jury thereafter returned the verdict finding each of the defendants guilty. (T.R. 464.)

Petitioner's motion for a new trial was denied (T.R. 46) and thereupon he was sentenced to pay a fine of \$1000, and be imprisoned for a period of eight months. Thereafter appellant duly appealed to the Circuit Court of Appeals for the Ninth Circuit. (T.R. 60.) That Court on December 16, 1946, rendered an opinion affirming the judgment. (T.R. 482.) Petitioner on January 13, 1947, filed a petition for a rehearing with the Circuit Court of Appeals. On February 28, 1947 (T.R. 499) the following order was made:

"The petition for a rehearing is denied.

"William Healy,

United States Circuit Judge

"Homer T. Bone,

United States Circuit Judge

"DENMAN, Circuit Judge, dissenting:

"The petition for rehearing should be granted and the judgments reversed. My concurrence in the decision is withdrawn and the accompanying opinion filed as a dissent to the Court's opinion filed on December 16, 1946."

The dissenting opinion (See T.R. 500) contains the following language applicable to this appellant:

"The statement of facts of the Court's opinion has a fatal vacuum necessary to be filled to establish the conspiracy charged, though its circumstantial evidence warrants the inference of at least four other disconnected criminal conspiracies.

"Abel, Blumenthal and Feigenbaum are shown to have been black marketeers and should have been prosecuted for selling whiskey at over ceiling prices. Instead, the several prosecutions are sought to be avoided by attempting to throw a conspiracy net around them—a convenience to prosecutors but often dangerous to the cause of justice. Cf. Kotteakos v. United States, 328 U.S. * * *, 90 L. Ed. 1178, 1183.

"The Court's opinion is bare of facts, as is the evidence,

"(1) That any of these three knew or was in any communication with any others of them;

"(2) That any knew that any other obtained whiskey from the defendants Goldsmith and Weiss;

"(3) That any of the three sellers knew that any other of them bought the whiskey from the

so-called "common pool" of whiskey in the warehouse—a common pool only in the sense that each separately obtained his whiskey from it, but not a pool of which any of the three had common knowledge that any other of them had obtained his whiskey from it;

"(4) That any knew that any other bought his whiskey at the same below-ceiling price;

"(5) That any knew that any other sold his whiskey at the same or similar over-ceiling prices.

"The obvious inference from the above proof and absence of other proof is that the unknown owner of the whiskey referred to in the Court's opinion used each of Abel, Blumenthal and Feigenbaum **separately** as his agent to violate the law. This would constitute several separate conspiracies between the unproved owners and each of the proved sellers, but not a conspiracy among all four of them.

"The owner is the common hub from which extend the three illicit sale conspiracies as spokes, but with no binding rim, as in the cases of *Kottekos v. United States*, 328 U. S. . . ., 90 L. Ed. 1178, 1181, and *Canella v. United States*, 157 F. 2d 470, 477."

JURISDICTIONAL STATEMENTS.

1. The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code as amended. (28 U.S.C.A. Sec. 347.)

2. The decision and judgment of respondent Circuit Court of Appeals was rendered December 16, 1946. (T.R. 482.) A petition for a rehearing was denied by the Circuit Court of Appeals February 28, 1947.

3. The bases upon which it is contended that the Supreme Court has jurisdiction herein and the cases believed to support such jurisdiction are in part as follows:

(a) Where a Circuit Court of Appeals has rendered a decision in conflict with the applicable decisions of this Court or of another Circuit Court of Appeals on the same matter, this Court has jurisdiction on certiorari to review the action of the Circuit Court of Appeals. (See: Rule 38, Section 5(b), Rules of the Supreme Court; *Department of Treasury v. Ingram Richardson Manufacturing Co.*, 313 U.S. 252, 85 L. Ed. 1313, 61 S. Ct. 866; *Helvering v. Price*, 309 U.S. 409, 60 S. Ct. 673, 84 L. Ed. 836; *National Licorice Co. v. National Labor Relations Board*, 308 U.S. 535, 60 S. Ct. 108, 84 L. Ed. 451; *Lane v. Wilson*, 305 U.S. 591, 59 S. Ct. 249, 83 L. Ed. 374.)

(b) Certiorari will be granted where a Circuit Court of Appeals has decided an important question of general law in a way probably untenable or in conflict with the weight of authority. (See: Rule 38,

Section 5(b), Rules of the Supreme Court; *Postal S. S. Corporation v. El Isleo*, 308 U.S. 378, 60 S. Ct. 332, 84 L. Ed. 335.)

(c) Certiorari will be granted where a Circuit Court of Appeals has so far departed from the accepted and usual course of judicial proceedings or has so far sanctioned such a departure of a lower court as to call for an exercise of this Court's power of supervision. (*United States v. Rizzo*, 297 U.S. 530, 56 S. Ct. 580, 80 L. ed. 844; *Le Tulle v. Scofield*, 308 U.S. 531, 60 S. Ct. 75, 84 L. ed. 447; *McNabb v. United States*, 318 U.S. 332, 87 L. ed. 918.)

(d) A writ of certiorari will issue on the ground of "importance" of the issue presented or on other grounds similar to those covered by the rule. (*Federal Trade Commission v. Raladam Co.*, 316 U.S. 149, 62 S. Ct. 966, 86 L. ed. 1336; *Williams v. Jacksonville Terminal Company*, 314 U.S. 590, 62 S. Ct. 64, 86 L. ed. 476; *National Labor Relations Board v. Express Publishing Company*, 312 U.S. 426, 61 S. Ct. 693, 85 L. ed. 930; *Sprague v. Ticonic National Bank*, 306 U.S. 623, 59 S. Ct. 463, 83 L. ed. 1028.)

THE QUESTIONS PRESENTED.

The questions presented and specifically brought forward by this petition for the issuance of a writ of certiorari are as follows:

1. That the evidence was insufficient to justify the verdict, that the trial Court erred in denying the

motion of petitioner to instruct the jury to render a verdict finding them not guilty, and that the Circuit Court of Appeals erred in deciding adversely to this contention of petitioner.

2. That the Circuit Court of Appeals erred in refusing to reverse the judgment of conviction for the error of the trial Court in admitting in evidence against this petitioner evidence of acts and declarations of alleged co-conspirators without any proof of conspiracy which is the *corpus delicti* of the offense.

3. That the conviction is void because a conspiracy to violate a regulation adopted by the Price Administrator is not punishable under the General Conspiracy Act. (18 U.S.C.A. Sec. 88)

THE REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT.

The Circuit Court of Appeals has rendered a decision contrary to the applicable decisions of this Court and of the several Circuit Courts of Appeals, including its own prior decisions, upon the precise question here involved.

The dissenting opinion of Judge Denman in the Court below, we submit, correctly states the law applicable to this case.

The questions heretofore stated are questions of grave importance and the Circuit Court of Appeals has so far sanctioned such a departure by the lower Court from the accepted and usual course of judicial

proceedings as to call for an exercise of this Court's power of supervision.

The foregoing reasons and questions are argued at large in the annexed brief filed in support of this petition.

Wherefore, petitioner respectfully prays that a writ of certiorari issue out of and under the seal of this Honorable Court, directed to the Honorable Judges of the United States Circuit Court of Appeals for the Ninth Circuit, commanding them to certify and send to this Court for its review and determination, on a day certain to be therein named, a full and complete transcript of the record of all proceedings in the cause therein depending entitled Harry Blumenthal, et al., Appellants v. United States of America, Appellee, and numbered 11232; and that the judgment of the said Circuit Court of Appeals may be reviewed by Your Honors and the judgment thereof reversed; and that your petitioner have such other and further judgment, order or relief as to this Honorable Court shall seem meet, just and proper in the premises; and your petitioner will ever pray.

Dated, San Francisco, California,

March 21, 1947.

HUGH K. McKEVITT,

Attorney for Petitioner.

MORRIS OPPENHEIM,

Of Counsel.

CERTIFICATE OF COUNSEL.

I hereby certify that I am a member of the bar of the Supreme Court of the United States and that I am of counsel for the petitioner in the above-entitled cause and that, in my judgment, the foregoing petition is well founded in point of law as well as in fact and that said petition is not interposed for delay.

Dated, San Francisco, California,
March 21, 1947.

HUGH K. McKEVITT,
Attorney for Petitioner.

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1946

No.

HARRY BLUMENTHAL,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

**BRIEF OF HARRY BLUMENTHAL IN SUPPORT OF PETITION
FOR WRIT OF CERTIORARI TO THE UNITED STATES
CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.**

THE OPINIONS DELIVERED IN THE COURT BELOW.

The opinion of the Circuit Court of Appeals was delivered December 16, 1946. (This opinion is not yet reported but is set forth in the transcript, page 482.) A petition for a rehearing was denied February 28, 1947. Circuit Judge Denman dissented from the order denying a rehearing, withdrew his concurrence in the original decision and filed a dissenting opinion which is set forth in the transcript. (Page 500.)

THE GROUNDS ON WHICH THE JURISDICTION OF THIS COURT IS INVOKED.

These are fully set forth in the foregoing petition for a writ of certiorari (pages 22, 23) under the heading, "A Summary and Short Statement of the Matter Involved," and, to avoid repetition, and in the interest of brevity, are here omitted.

STATEMENT OF THE CASE.

This is likewise fully set forth in the foregoing petition (page 2, *et seq.*) and in the interest of brevity, is here omitted.

SPECIFICATION OF THE ASSIGNED ERRORS INTENDED TO BE URGED.

These are likewise set forth in the foregoing petition under the heading, "The Questions Presented and the Reasons Relied On for the Allowance of the Writ," and restatement thereof is here omitted in the interest of brevity.

ARGUMENT.

- I. **THE EVIDENCE WAS INSUFFICIENT TO JUSTIFY THE VERDICT AND THE TRIAL JUDGE THEREFORE ERRED IN DENYING THE MOTION OF PETITIONER TO INSTRUCT THE JURY TO RETURN A VERDICT OF NOT GUILTY.**

The testimony and other evidence taken at the trial, relating to the petitioner, Blumenthal, is fully set forth in the annexed petition for a writ of certiorari.

The evidence presented by the Government, if believed by the jury, tended to show the following facts:

The defendant, Goldsmith, doing business under the name and style of Francisco Distributing Company, was a duly and regularly licensed wholesale liquor dealer holding the permits required by law to do business as such. The appellant, Weiss, acted as a salesman for this concern. In the month of December, 1943, the Francisco Distributing Company purchased from an eastern concern, known as the Penn Midland Import Company, a carload of a brand of liquor known as Old Mr. Boston Rocking Chair Whiskey. The testimony further tends to show that the defendants, Blumenthal, Feigenbaum and Abel, had certain transactions relating to this whiskey with various persons who testified as witnesses for the Government. As pointed out in the statement of the case contained in the foregoing petition, as well as in the dissent of Judge Denman, **there was not the slightest evidence that these three defendants were acquainted with one another or that any of them had any knowledge of what the others were doing or even knew of their existence.** The *modus operandi* followed by these three defendants was similar and was, in brief, as follows: There was, at that time, a very great shortage of whiskey in San Francisco and the surrounding area, and the commodity was in great demand. Proprietors of restaurants, taverns and bar rooms were willing to pay almost any price for the commodity. The three defendants last named on two or more occa-

sions were approached by persons looking for whiskey. The intended purchaser was told that the whiskey was obtainable and that it would cost him a sum considerably in excess of the alleged ceiling price. The purchaser was directed to make out a check to the Francisco Distributing Company for a price somewhat below the alleged maximum or ceiling price (**this maximum price was never proven**), and to pay an additional amount in cash to the defendant who participated in the transaction. Thereafter, the whiskey would be delivered.

As pointed out in the dissenting opinion of Circuit Judge Denman, there is not the slightest evidence that any of the cash paid to any of the said three defendants in any of the transactions was ever "cut up" with the Francisco Distributing Company operated by the appellant, Goldsmith.

There is, likewise, absolutely no evidence of any conspiracy between this petitioner and Feigenbaum and Abel, or either of them.

Each of the transactions testified to **was a separate and distinct transaction between the appellant involved and the purchaser of the liquor.**

If any conspiracy was established at all, it was between the defendant involved in the transaction and the purchaser, and not between the defendant involved and any of his co-defendants.

The evidence, viewed in the light most unfavorable to this petitioner, shows merely this: That Blumenthal sold some of the whiskey mentioned in the indict-

ment to the witnesses, Travis, Fingerhut and Lombardi. The substance of all of the testimony relative to the transactions of Blumenthal, is set forth in the foregoing petition (pages 7 to 17). These men dealt with Blumenthal alone. It appears that the whiskey was in the possession, actual or constructive, of the Francisco Distributing Company, which was conducted by the appellant, Goldsmith, and that appellant caused the purchaser, in each of these instances, to make a check out payable to the order of that concern. In addition thereto, the purchaser, in each instance, paid an additional sum to Blumenthal. There is not the slightest evidence, however, that any part of this additional sum went to anyone other than this petitioner. In other words, the evidence failed to show any concert between petitioner and Goldsmith as to the charging of this additional amount. The sum paid to the Francisco Distributing Company was indisputably **under** the so-called "ceiling price" of the whiskey. The record is destitute of any evidence that Goldsmith knew that Blumenthal was charging the additional amount mentioned, or that there was any agreement between them that such additional amount was to be charged. As far as the other defendants are concerned, there is no shred of evidence in the record that Blumenthal knew any one of them or ever participated in any of their transactions, or had any knowledge of the same. What the Circuit Court of Appeals has actually done is to take the separate transactions of the various defendants, and, because Feigenbaum, for example, sold some of the whiskey

in the same manner as Blumenthal, has held that the jury had the right to infer that there was a conspiracy, merely because of the similarity of the *modus operandi*. The Circuit Court of Appeals, we submit, has merely piled inference upon inference, which, under the most elementary rules of evidence, cannot be done, because an inference must be founded upon a proven fact and not upon another inference.

That evidence of this character is insufficient to convict under an indictment charging a general conspiracy in which all of the defendants participated, is squarely and decisively held by this Honorable Court in the recent case of *Kotteakos v. United States*, 90 L. ed. (Advance Opinion) 1178, 66 S. Ct. 1239. The opinion of the Circuit Court of Appeals, referring to the *Kotteakos* case, merely states that, in the case at bar,

"the jury was justified in inferring that the appellants were parties to a single agreement and conspiracy to commit the offenses charged in the indictment, and that the overt acts established in the evidence were done and performed by appellants to further and carry into execution the objects and purposes of the conspiracy."

To state the matter otherwise—the Circuit Court of Appeals has held that because the jury found that there was a conspiracy, therefore the evidence showed that there was a conspiracy.

This we submit, is the pronouncement of a legal *non sequitur*. We further submit that the Circuit Court

of Appeals has assumed its hypothesis and that the foregoing language is the sheer *ipse dixit* of the learned author of the opinion.

Kotteakos v. United States, *supra*, is indistinguishable from the case at bar. In the *Kotteakos* case the indictment charged a general conspiracy in which a number of people operating through a common key figure, Simon Brown, were to make applications to various financial institutions for credit with the intent that the loans or advances would then be offered to the FHA for insurance upon applications containing false and fraudulent information. Seven of the defendants charged were found guilty. The evidence established that several applications for such loans had been made through the key figure Brown, but as this Honorable Court states, "no connection was shown between them and petitioners, other than that Brown had been the instrument in each instance for obtaining the loans. In many cases the other defendants did not have any relationship with one another, other than Brown's connection with each transaction."

Following the foregoing language this Honorable Court says:

"The proof therefore admittedly made out a case, not of a single conspiracy, but of several, notwithstanding only one was charged in the indictment. Cf. *United States v. Falcone*, 311 U. S. 205, 85 L. ed. 128, 61 S. Ct. 204; *United States v. Peoni* (C.C.A. 2d), 100 F. 2d 401; *Tinsley v. United States* (C.C.A. 8th), 43 F. 2d 890, 892, 893. The Court of Appeals aptly drew

analogy in the comment, "Thieves who dispose of their loot to a single receiver—a single "fence"—do not by that fact alone become confederates; they may, but it takes more than knowledge that he is a "fence" to make them such.' "

The *Kotteakos* case does not stand alone. The same rule is followed in *Berger v. United States*, 295 U. S. 78, 55 S. Ct. 629, 79 L. ed. 1314, *Wyatt v. United States*, 23 Fed. (2d) 791, *Parnell v. United States*, 64 Fed. (2d) 324. Each of the two cases last cited clearly holds that an indictment for one large conspiracy is not sustained by proof of several smaller conspiracies participated in by some of the alleged conspirators.

In the very recent case of

Fiswick v. United States, decided December 9, 1946, 90 L. ed. (Adv.) 183, 189,

this Honorable Court reversed a conviction of conspiracy because the lower Court did the very thing done by the trial judge in the case at bar, that is, admit evidence of the acts and declarations of each defendant against all of his co-defendants. The opinion of the Court, written by Justice Douglas, contains the following language:

"It is true, as respondent emphasizes, that none of these admissions implicates any petitioner except the maker. But since, if there was a conspiracy, Draeger and Vogel were its hub, evidence which brought each petitioner into the circle was the only evidence which cemented them together in the illegal project. And when the jury was told that the admissions of one, though not

implicating the others, might be used against all, the element of concert of action was strongly bolstered, if not added. Without the admissions the jury might well have concluded that there were three separate conspiracies, not one. Cf. *Kotteakos v. United States*, 328 U.S., 90 L. ed., 66 S. Ct. 1239, supra. With the admissions, the charge of conspiracy received powerful reenforcement. And the charge that each petitioner conspired with the others became appreciably stronger, **not from what he said but from what the other two said.** We therefore cannot say with any confidence that the error in admitting each of these statements against the other petitioners did not influence the jury or had only a slight effect. Indeed, the admissions may well have been crucial. * * * And the admissions so strongly bolstered a weak case that it is impossible for us to conclude the error can be disregarded under the 'harmless error' statute. The use made of the admissions at the trial constituted reversible error."

The *Kotteakos* case also held that there was a fatal variance between the allegations of the indictment and the proof, and that the doctrine of harmless error could not be invoked.

As far as the petitioner Blumenthal is concerned, the evidence against him, assuming it all to be true, shows nothing more than that he agreed with the buyers, Fingerhut and Travis, to sell above the ceiling price. If he conspired with anyone it was with them, and with them alone.

This Honorable Court (*United States v. Norris*, 281 U.S. 619, 74 L. ed. 1076) has doubted that the buyer and seller of whiskey can be co-conspirators as a matter of law; but whether they can or not, we most assuredly have no evidence here of a conspiracy between anyone else than the buyer and the seller, and that conspiracy is not charged in the indictment.

In *Canella v. United States*, 157 Fed. (2d) 470 the Circuit Court of Appeals for the Ninth Circuit reversed the conviction of two of the defendants appealing from a judgment finding them guilty of conspiracy to defraud the United States on the ground that the evidence showed, not one conspiracy, as charged in the indictment, but several conspiracies, with some of which two of the defendants were not concerned. The Court says *inter alia*:

"In the instant case there are at least five separate conspiracies. In the *Berger* case, *supra*, the Supreme Court stated that the objection to proving several separate conspiracies where only one is alleged, was not that the indictment did not describe the particular conspiracy of which the defendant was convicted, but that the Government's proof included more. (295 U.S. 81, 55 S. Ct. 629, 79 L. Ed. 1314.) * * *

Citing *Kotteakos v. U. S.*, *supra*, the Circuit Court of Appeals proceeds:

"When many conspire, they invite mass trial by their conduct. * * * (but) wholly different is it with those who join together with only a few * * *. Criminal they may be, but it is not

the criminality of mass conspiracy. They do not invite mass trial by their conduct. Nor does our system tolerate it.' 66 S. Ct. 1252."

It is worthy to note that both Judge Healy, who concurred in the majority opinion in the instant case, and Judge Denman, who dissented, concurred in reversing the conviction in the *Canella* case.

II.

THE CIRCUIT COURT OF APPEALS HAS ERRED IN UPHOLDING THE ERROR OF THE TRIAL JUDGE IN ADMITTING AGAINST PETITIONER, OVER HIS OBJECTION, THE EVIDENCE OF THE ACTS AND DECLARATIONS OF HIS ALLEGED CO-CONSPIRATORS.

At the conclusion of the case for the Government the trial judge over the objection of petitioner (T. R. 390-409) admitted all evidence which had been offered against any defendant as against all of the defendants, and denied the motion of counsel for petitioner to strike out all of the evidence so admitted. (T. R. 396.) Thus there was admitted in evidence a vast mass of testimony relating to transactions participated in by the other defendants named in the indictment and by various other persons not charged at all*—transactions in which Blumenthal took no part, and of which there was not a word of evidence tending to establish that he had any knowledge—all this without

*Evidence was admitted of alleged sales made by three unidentified persons, not shown to have had any connection with any defendant on trial. (T.R. 301-2; 345, *et seq.*; 348 *et seq.*)

any proof of any conspiracy or that petitioner Blumenthal was a member of any conspiracy. It needs no citation of authorities to support the elementary proposition that before any acts or declarations of any alleged co-conspirator are admissible against or binding upon the accused, it must be shown that he was a member of the conspiracy.

Kassin v. United States, 87 Fed. (2d) 183.

Even knowledge of the conspiracy without active participation therein is insufficient.

Young v. United States, 48 Fed. (2d) 26;

Tingle v. United States, 38 Fed. (2d) 573;

State v. Naylor, 113 W. Va. 446, 168 S. E. 489;

Turcott v. United States, 21 Fed. (2d) 829;

Jianole v. United States, 299 Fed. 496;

Greenspahn v. United States, 298 Fed. 736;

Lucadamo v. United States, 280 Fed. 653.

Unless and until it was established by the evidence that a conspiracy had been formed, and that the defendant was a member thereof, no act or declaration of an alleged conspirator was admissible in evidence against him. The law in that behalf is well stated by the late Justice Richards in *People v. MacPhee*, 26 Cal. App. 218, 224, 146 Pac. 522, where it is said that:

"Such proof cannot consist merely in the acts and declarations of the alleged co-conspirators, but must be in the nature of an independent showing as to the existence of the conspiracy."

As we have heretofore shown, at great length and with the citation of numerous authorities, and with

the quotation of lengthy excerpts from the evidence, there is not a shred, not even the veriest pretense of a showing, that any conspiracy was ever entered into between any of the defendants, much less that Blumenthal was ever a member thereof.

We are well aware that numerous decisions hold that it is unnecessary in prosecutions for conspiracy to prove that the alleged conspirators held a meeting and entered into a formal or express agreement that they would commit a particular crime. We have no quarrel with this rule, which is one of necessity, because in most cases it would be impossible to prove a formal agreement. But that is quite a different thing from saying that **no** proof of an agreement is necessary. There must be, as stated in some of the opinions heretofore cited, some evidence of a meeting of the minds, some evidence of at least a tacit understanding among the alleged conspirators, that they would act in concert with a view to the commission of the substantive offense. But here there is no such showing. While it is true that Blumenthal, if the Government's testimony is to be believed, used a *modus operandi* similar to that employed by some of the other defendants, there is an utter want of evidence that Blumenthal had any knowledge whatever of what any of his co-defendants ever did; indeed, there is an entire failure of proof that he ever knew or had even heard of any of those who were indicted jointly with him.

This being so, no act or declaration of theirs could prejudice him.

The learned trial judge fell into the error of believing that because different persons did acts of a similar nature, a jury would be warranted in inferring that they acted in collusion with each other. Such, we submit, is not the law.

It would be just as logical to argue that because five different persons, each single-handedly, held up five different banks on five different occasions, and that they all happened to buy their pistols from the same hardware store or sporting goods establishment, they could be found guilty of a conspiracy to commit the crime of robbery, without any showing of any concert between them or that they had ever met or even knew each other. No lawyer, we think, who valued his reputation for sanity would argue that such evidence would sustain a conviction of conspiracy; yet that is the very result that has been achieved in the case at bar through the error of the learned trial judge in submitting to the jury as a question of fact, what he should have determined himself as a question of law.

This Honorable Court has enunciated and enforced the same principle in *Glasser v. United States*, 315 U. S. 60, 86 L. ed. 680.

In prosecutions for conspiracy the conspiracy itself is the *corpus delicti*. (*Shannaberger v. United States*, 99 Fed. (2d) 957, 961; *Cartello v. United States*, 93 Fed. (2d) 412; *Tingle v. United States*, supra; *Young v. United States*, supra; *Langer v. United States*, 76 Fed. (2d) 817.) Until that is established, no acts or declarations of alleged co-conspirators are admissible. (*Glasser v. United States*, supra.)

III.

THE INDICTMENT, VERDICT ~~AND~~ JUDGMENT ARE VOID BECAUSE CONSPIRACY TO VIOLATE A PRICE REGULATION IS NOT PUNISHABLE UNDER THE GENERAL CONSPIRACY STATUTE (18 U.S.C.A. 88).

Petitioner by motion made in the District Court to quash the indictment (T.R. 16) made the point that since the Emergency Price Control Act makes it a misdemeanor to **agree** (conspire and agree are one and the same thing) to violate the price regulations, it was clearly the intention of Congress that such an agreement was punishable exclusively under the Price Control Act, and that persons who conspired to violate regulations, made pursuant to that act were not amenable to the penalties of the General Conspiracy Act. Such a construction, we submit, is the only fair and just construction of the statute. It must be borne in mind that the Emergency Price Control Act is a war measure, valid and constitutional only because enacted in the exercise of the war powers conferred on Congress by the Constitution of the United States. It is avowedly, and is so designated by its own title, an emergency measure. The regulations adopted and promulgated thereunder are the acts of an administrative officer. They prohibit the doing of things which are not only not *mala in se*, but which, in normal times, the return of which the President of the United States has proclaimed by his proclamation of December 31, 1946, declaring hostilities at an end, are legitimate business transactions, which, far from being reprehensible, have always been regarded as commendable. It is but fair to presume that Congress did

not intend to inflict upon those who agree to do acts ordinarily proper and lawful, penalties as harsh as those imposed upon persons who conspire to commit infamous crimes against the United States, or in some manner to defraud the United States. That this is a proper construction of the penal provisions of the Price Control Act is apparent from the analogy of other statutes, such as the Sherman Act. Sections 1 and 2 of that Act are to all intents and purposes identical with Sections 4 (a) and 205 (b) of the Price Control Act. Such a construction has been placed upon the Sherman Act by the Courts. *United States v. Kissel*, 173 Fed. 823, 825, *United States v. Patterson*, 201 Fed. 697, 723. In the first of these cases Judge Holt says:

"This indictment is necessarily brought under the provisions of the Sherman Act. * * * **Nor could this indictment have been brought under Section 5440 of the United States Revised Statutes**, because there is no law of the United States making a conspiracy in restraint of trade or to monopolize trade an offense against the United States except the Sherman Act, and **there cannot be a conspiracy to engage in a conspiracy.**"

CONCLUSION.

It is respectfully submitted that the opinion of the Circuit Court of Appeals is directly contra to the applicable decisions of this Court and that important questions of statutory construction, and the funda-

mentals of criminal evidence and orderly criminal procedure, are involved, and that a clear case is presented for the exercise by this Honorable Court of its supervisory powers, to which end a writ of certiorari should be granted.

Dated, San Francisco, California,
March 21, 1947.

HUGH K. McKEVITT,
Attorney for Petitioner.

MORRIS OPPENHEIM,
Of Counsel.

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In the Supreme Court of the United States

OCTOBER TERM, 1946

No.

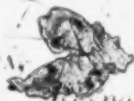
1143

LAWRENCE B. GOLDSMITH,

Petitioner,

vs.

UNITED STATES OF AMERICA,



Respondent.

**Petition for Writ of Certiorari to the
United States Circuit Court of Appeals
for the Ninth Circuit
and Brief in Support Thereof**

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In the Supreme Court of the United States

OCTOBER TERM, 1946

No.

LAWRENCE B. GOLDSMITH,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

Petition for Writ of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit

*To the Honorable Fred M. Vinson, Chief Justice of the
United States, and to the Honorable the Associate Jus-
tices of the Supreme Court of the United States:*

Petitioner, Lawrence B. Goldsmith, and four others, were charged with conspiracy and were convicted in the United States District Court for the Northern District of California, Southern Division. Each appealed to the United States Circuit Court of Appeals for the Ninth Circuit. In

proceedings in that Court, entitled and numbered "Harry Blumenthal, Louis Abel, Lawrence B. Goldsmith, Samuel S. Weiss and Albert Feigenbaum, Appellants, vs. United States of America, Appellee," No. 11232, the conviction was affirmed by a divided court. Petitioner asks that a Writ of Certiorari issue to the United States Circuit Court of Appeals for the Ninth Circuit to bring the cause here for review and determination as to him. He is advised that other defendants and appellants will ask that such writ issue and that such review and determination be had. In this behalf your petitioner respectfully shows:

I.

PROCEEDINGS BELOW AND JURISDICTION

1. The Grand Jury for the Northern District of California, Southern Division, returned an indictment charging that Lawrence B. Goldsmith and others (in violation of Crim. Cod. §37, 18 U.S.C.A. §88, the general conspiracy statute) did knowingly, etc. conspire etc. to commit the offense of knowingly etc. selling certain whiskey in excess of the maximum price of \$25.27 per case established by law, in violation of 50 U.S.C.A. §§902(a), 904(a) and 925(b) and Office of Price Administration Regulations, and that in pursuance of such conspiracy the defendants committed specified overt acts in said division and district (R 3). Defendants pleaded not guilty (R 11), the cause was tried (Bill of Exceptions, R 238 etc.), defendants' motions for directed verdicts were denied, and the jury returned a verdict of guilty as to each defendant (R 31, 463, 464). On the next day, May 24, 1945, motions for new trial and in arrest of judgment were made and denied (R 42-47) and judgment was entered that petitioner be

imprisoned for two months and pay a fine of \$1,000 (R 55). The jurisdiction of the District Court was rested on a charge of violation of the general conspiracy statute (Crim. Cod. §37, 18 U.S.C.A. §88) and on U. S. Const. Art. III, §2; U. S. Const. Amend. VI; Jud. Cod. §24' (28 U.S.C.A. §41(2)); 18 U.S.C.A. §546.

2. On the day that judgment was entered petitioner appealed (R 65). A stipulation and order in respect of exhibits was made on July 19, 1945 (R 467), petitioner served and filed his assignment of errors (R 205-238), a Bill of Exceptions was settled and filed (R 238-467), and the certified record (R 471) was filed and the cause docketed in the Circuit Court of Appeals for the Ninth Circuit on January 18, 1946 (R 472).

3. In the Circuit Court of Appeals the cause was heard and determined by Circuit Judges Denman, Healy and Bone. On December 16, 1946, that court affirmed the judgment (R 481; 158 or 159 F. 2d.; opinion set out in Appendix A). On January 14, 1946, and within the time allowed by the Rules of the Circuit Court of Appeals for the Ninth Circuit (Rule 25), petitioner served and filed a petition for rehearing (R 505). On February 28, 1947, the Court denied the petition but Circuit Judge Denman dissented, withdrew his concurrence in the opinion filed December 16, 1946, and filed a dissenting opinion on the merits in which he concluded that the judgment should be reversed (R 499; F. 2d.; Appendix A). The jurisdiction of the Circuit Court of Appeals is sustained by the constitutional provisions above noticed and, Jud. Cod. §116 (28 U.S.C.A. §211); Jud. Cod. §128 (28 U.S.C.A. §225); 18 U.S.C.A. §688 (formerly 28 U.S.C.A. §723(a)) and Rule III of the Rules of Practice and Procedure in

Criminal Cases of May 7, 1934 (292 U.S. 661, App. IV, 78 L.ed. 1513).

4. Agreeably to Rule 37(b) of the Federal Rules of Criminal Procedure of 1946 (adopted pursuant to the Act of June 29, 1940, c. 445, 54 Stat. 688; 18 U.S.C.A. §687) and Rules 38 and 12 para. 1 of the rules of this Court this petition is filed. It is believed that the jurisdiction of this Court is sustained by the foregoing rules and U. S. Const. Art. III, Sec. 2 para. 2, and Jud. Cod. §240(a) as amended by Act of February 13, 1925 (28 U.S.C.A. §347(a)). (*United States v. Falcone*, 311 U.S. 205, 85 L.ed. 128; *Direct Sales Co. v. United States*, 319 U.S. 703, 87 L.ed. 1674; *Kotteakos v. United States*, 326 U.S., 90 L.ed. (Adv. Op.) 1178; *Warszower v. United States*, 312 U.S. 342, 85 L.ed. 876; *Fiswick v. United States*, U.S., 91 L.ed. (Adv. Op.) 183.)

II.

SUMMARY STATEMENT OF THE MATTERS INVOLVED AND RULINGS

The substance of the indictments and the principal steps in the case have been set out above. The evidence showed:

Petitioner Goldsmith, doing business as Francisco Distributing Company at 122 Tenth Street, San Francisco, California, held a liquor wholesaler's basic permit (R 243-245). Nothing else appears as to this organization,— nothing as to the nature or size of its business or the character, number or functions of its employees, except that it did appear from the Harkins testimony, given below, that Weiss was sales manager and there was a

bookkeeper. It did not appear who actually handled for Francisco Distributing Company phases of the transactions here involved, or that petitioner Goldsmith had anything to do with any part of the transactions or, indeed, knew anything about them, except as we shall state affirmatively.

In December 1943 and January 1944 two carloads of whiskey, 4040 cases, arrived in San Francisco consigned to Francisco Distributing Company and physically handled for it through a warehouse. The whiskey was billed to Francisco Distributing Company and drafts for payment were sent to Bank of America. (R 251, 252, 257, 259, 263-268, 343, 344; U. S. Ex. 2, 3) The Bank notified Francisco, petitioner Goldsmith instructed the bank to pay the drafts and they were paid by being charged to the Francisco bank account (R 265-268, 343, 344).

All the whiskey, 4040 cases, was sold. It was shipped from the warehouse on orders given by Weiss to the warehouse (R. 252-256). As required, proper records were kept and filed with the Government showing every purchase and sale by Francisco and, as to the sales of this whiskey, the name and address of every buyer (U. S. Ex. 2, 3; R 246-249).

The cost to Francisco Distributing Company of the whiskey, delivered at San Francisco, was \$21.97 per case. The O.P.A. ceiling price was fixed by multiplying this figure by 1.15. A ceiling of \$25.27 per case resulted. Francisco, on the sales of this whiskey, invoiced and billed it out at \$24.50 per case and received this amount and no more. This developed a gross profit of \$2.53 per case (R 263-277, 387).

1. Not printed. See stipulation, R 467.

Although the Government knew the name and address of every purchaser of the 4040 cases, it produced evidence of over-the-ceiling sales of only 1575 cases at most. It must be presumed that the remaining 2465 cases were properly sold at or under the ceiling price. The Government produced evidence of over-the-ceiling sales of 1575 cases by calling the purchasers. There were 13. Three dealt with and through another purchaser. Giometti dealt with Reinburg. Reinburg dealt with defendant Abel. Vakota and Lewis dealt with Cernusco. Cernusco dealt with an unknown man, who was in no way identified. The same is true of Figone, Vogel and Duffy. Taylor and Humes dealt with defendant Feigenbaum. Lombardi, Travis and Fingerhut dealt with defendant Blumenthal. None of the persons, identified or unidentified, with whom any of the buyers dealt, was Weiss or petitioner Goldsmith, or was shown to be connected in any way with Weiss or Goldsmith or Francisco Distributing Company. The transactions were handled in the following way:

The prospective buyer of whiskey was quoted a price by the person with whom he dealt. This price varied from \$55 to \$65 per case. He agreed to buy at this price. In due course he received the number of cases of whiskey wanted by him and a bill or invoice from Francisco Distributing Company showing the price of the whiskey as \$24.50 per case. In each instance the buyer paid for the whiskey by giving a check made out to Francisco Distributing Company (except in one instance in which it was made out in blank) for the number of cases he was taking times \$24.50 and making to the person with whom he dealt an additional payment in cash sufficient to bring his payment per case up to the price quoted to him. Francisco

Distributing Company received the \$24.50 per case and no more. There was no evidence that it, or Goldsmith, or anyone else connected with Francisco Distributing Company had any knowledge of the price paid by the buyer or of these cash "side-payments."

This is the whole showing (the defendants offered no testimony) except for the testimony of the witness Harkins, a special investigator for the Alcohol Tax Unit. He testified, over objections, to conversations with petitioner Goldsmith, or in his presence, after the transactions were concluded; that it was stated that Francisco Distributing Company got \$2.00 per case for clearing the whiskey through their books and that Goldsmith and Weiss divided this; that when petitioner Goldsmith was questioned "about who actually bought him the whiskey, who owned it," he said that Blumenthal brought it in and when asked if he knew of his own knowledge said "no"; that Goldsmith said that certain of the invoices were in his handwriting; that Weiss was his sales manager.

This is all!

The statement just made as to what the evidence does and does not show is subject to all the weaknesses of any general negative statement. Its accuracy is readily verified, however. *There is no statement to the contrary in the majority opinion.* The court does not undertake to state any evidence but satisfies itself by saying merely that "there was evidence in this case from which the jury could properly have inferred beyond a reasonable doubt: * * *

Judge Denman, in his dissenting opinion, says: "Abel, Blumenthal and Feigenbaum are shown to have been black marketers and should have been prosecuted for selling whiskey at over ceiling prices. In-

stead, the several prosecutions are sought to be avoided by attempting to throw a conspiracy net around them—a convenience to prosecutors but often dangerous to the cause of justice. Cf. *Kotteakos v. United States*, 328 U.S., 90 L.ed. 1178, 1183.

The court's opinion is bare of facts, as is the evidence,

(1) That any of these three knew or was in any communication with any others of them;

(2) That any knew that any other obtained whiskey from the defendants Goldsmith and Weiss;

(3) That any of the three sellers knew that any other of them bought the whiskey from the so-called "common pool" of whiskey in the warehouse—a common pool only in the sense that each separately obtained his whiskey from it, but not a pool of which any of the three had common knowledge that any other of them had obtained his whiskey from it;

(4) That any knew that any other bought his whiskey at the same below-ceiling price;

(5) That any knew that any other sold his whiskey at the same or similar over-ceiling prices.

The same is true also of the appellants Weiss and Goldsmith. The conspiracy charged is that they conspired with the three black marketers, Abel, Blumenthal and Feigenbaum to sell the whiskey at higher than the maximum price. The court's opinion states no facts and the record has none showing that either Weiss or Goldsmith knew that any whiskey was sold at such higher prices, much less that there was any agreement with the three or any one of them for such prohibited sales." (R 500-503).

Our statement, and Judge Denman's, is confirmed by the Government's own summary of the evidence in its

brief in the Circuit Court of Appeals. Rather than attempt to summarize that evidence ourselves, for the purposes of this petition, we use the Government's own summary. It is attached as Appendix B to this petition and the supporting brief.

As each bit of evidence came in it was appropriately objected to by each of the defendants who was not, by that evidence itself, connected with the matter testified to. The trial court made a general ruling that the evidence be received only against the particular defendant who was tied in by it with the matter then being testified to (R 254, 255). At the close of all its evidence the Government moved to admit all of the evidence against all of the defendants. Each defendant fully objected stating his specific grounds of objection. As to evidence already in the objections were accompanied by motions to strike. The motion of the Government was granted and those of the defendants denied (R 390-421). The grounds of objection fully stated that as to each defendant the matters affecting the other defendants were irrelevant, without foundation, *res inter alios acta*, and there had been no proof of the corpus delicti. The Harkins testimony was admitted only against defendants Goldsmith and Weiss. To that testimony petitioner Goldsmith made the specific objection that no foundation was laid and there was no proof of any corpus delicti of the crime charged in the indictment. This objection was made at the time the evidence was offered (R 381) and, again, in arguing the objections to the Government's motion and the motion to strike (R 410. See also R 229 et seq., 422-424).

At the close of the Government's evidence (none of the defendants offered any evidence) each defendant moved for a directed verdict, stating in detail the grounds. The motions were denied (R 421-429). Among the grounds specified were insufficiency of evidence to support a verdict of guilty, that the offense charged had not been proved, that there had been failure to prove that any defendant was a party to any conspiracy; that the acts or declarations of any alleged co-conspirator were not brought home to any other defendant by knowledge, authorization or consent; that the only thing proved was a series of isolated transactions; that there was no independent proof of the corpus delicti and no evidence of any connection of petitioner with any conspiracy and no evidence touching petitioner except that he directed payments of the bank draft and the incompetent hearsay testimony of Harkins as to extra-judicial statements. The later proceedings have been outlined above.

III.

THE QUESTIONS PRESENTED AND THE REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT

The question of the sufficiency of the indictment was raised by motion in arrest of judgment. (R 43, 44). The other substantial questions were raised by objections to evidence, motions to strike evidence and the motion for a directed verdict. All raised substantially the same questions. The admissibility of evidence of acts and declarations of other defendants and unidentified negotiators is substantially a question of the sufficiency of the evidence

to show that petitioner was connected with these acts or declarations. (Cf. *Fiswick v. United States*, U.S., 91 L.ed. (Adv. Op.) 183, 67 S.Ct. 224). The objection to the Harkins testimony is substantially an objection to its sufficiency (*Warszower v. United States*, 312 U.S. 342, 347, 85 L.ed. 876, 880). Accordingly, these other questions can be stated in terms of sufficiency of the evidence to sustain a conviction. The questions thus presented, and the reasons relied on for allowance of the writ, are as follows:

1. Does the indictment state the offense of criminal conspiracy, i.e., violation of Criminal Code §37, 18 U.S. C.A. §88? Does not the Emergency Price Control Act (Appendix C hereto) so fully occupy the field when it itself makes it unlawful "for any person to sell or deliver any commodity * * * in violation of any regulation * * * or to offer, solicit, attempt, or agree to do any of the foregoing" that there is no room to charge a conspiracy under the general conspiracy statute when all of the acts charged as a violation of the conspiracy statute are specifically covered and denounced by the Emergency Price Control Act and by it made a misdemeanor only? The Circuit Court of Appeals held that the application of Emergency Price Control Act to the conduct charged did not exclude the operation of the general conspiracy statute and in so holding decided an important question of Federal law which has not been, but should be, settled by this Court. (Cf. A charge of conspiracy in restraint of trade states an offense under the Sherman Act not under the general conspiracy statute, *United States v. Kissel*, 218 U.S. 601, 606, 54 L.ed. 1168, 1178. Cf. also *Gebaidi v. United States*, 287 U.S. 112, 121, 122, 77 L.ed. 206, 211; *United States v. Zenli*, 137 F. 2d. 845 (C.C.A. 2).

2. Was there "relevant evidence from which the jury could properly find or infer, beyond a reasonable doubt" (*Mortensen v. United States*, 322 U.S. 369, 374, 88 L.ed. 1331, 1335²; *American Tobacco Co. v. United States*, 328 U.S., 90 L.ed. (Adv. Op.) 1095, 1098 n. 4) that petitioner Goldsmith was guilty of the conspiracy charged or any conspiracy? Was not the evidence insufficient as a matter of law in the particulars now to be specified, each of which, for the reasons noticed, warrants the allowance of the writ?

(a) The evidence showed at most a series of independent and separate transactions, having no relation to each other in purpose or design and no element in common except that they involved black market sales of whiskey at about the same time. In holding that evidence of such separate transactions sustained the charge of a single conspiracy the court below decided a Federal question in a way probably in conflict with the applicable decision of this Court (*Kotteakos v. United States*, 326 U.S., 90 L.ed. (Adv.Op.) 1178).

2. The court recognized the usual rule as to the force of a jury finding and went on: "But we have never hesitated to examine a record to determine whether there was any competent and substantial evidence fairly tending to support the verdict. Cf. *Abrams v. United States*, 250 U.S. 616, 619, 63 L.ed. 1173, 1175, 40 S.Ct. 17."

United States v. Wise, 108 F.2d 379, 383 (C.C.A. 7), reversing as to defendant Wise, says: "While impressed by the rule which makes the jury the sole judge of the facts in criminal cases and even more impressed by the fact that the trial court did not set aside the verdict, as contrary to the evidence, we are nevertheless weighed with a responsibility which must be met, namely, of examining all the evidence to ascertain where there is substantial proof of Wise's participation in the alleged scheme to defraud." The court found none and, accordingly, reversed as to Wise.

(b) The evidence showed only independent and isolated acts and declarations of alleged co-conspiracy not brought home to this petitioner by knowledge, consent or authorization. In holding that such evidence was sufficient to sustain a conviction of this petitioner the court below decided a Federal question in a way probably in conflict with applicable decisions of this Court (*Kotteakos v. United States*, supra; *Fiswick v. United States*, U.S., 91 L.ed. (Adv.Op.) 183; *Glasser v. United States*, 315 U.S. 60, 86 L.ed. 680) and rendered a decision in conflict with decisions of other Circuit Courts of Appeals on the same matter (*Thomas v. United States*, 57 F. 2d 1039 (C.C.A. 10); *United States v. Liss*, 137 F. 2d 995, 998 (C.C.A. 2, cert. den. 320 U.S. 773, 88 L.ed. 962); *Egan v. United States*, 137 ~~U.S.~~^{F.2d} 369, 378 (C.C.A. 8); *Wyatt v. United States*, 23 F. 2d 791, (C.C.A. 3); *Young v. United States*, 48 F. 2d 26 (C.C.A. 5).)

(c) The evidence showed no more than that petitioner, legitimately engaged in the business of a wholesaler of liquor, supplied liquor and as a result of conduct of other persons, unknown to him and unparticipated in by him, it was paid for at prices over the ceiling price. The court below in holding that this sustained a conviction of conspiracy decided a Federal question in a way probably in conflict with the applicable decisions of this Court (*United States v. Falcone*, 311 U.S. 205, 85 L.ed. 128; *Direct Sales Co. v. United States*, 319 U.S. 703, 87 L.ed. 1674) and rendered a decision in conflict with decisions of other Circuit Courts of Appeals on the same matter (*Bacon v. United States*, 127 F. 2d 985 (C.C.A. 10); *Thomas v. United States*, supra; *Young v. United States*, supra; *United*

States v. Gerke, 125 F. 2d. 243, 246 (C.C.A. 3, cert. den. 316 U.S. 667, 86 L.ed. 1742); *Moss v. United States*, 132 F. 2d. 875, 879 (C.C.A. 6); *Goodman v. United States*, 128 F. 2d. 854 (C.C.A. 9); *Tingle v. United States*, 38 F. 2d. 573 (C.C.A. 8).)

(d) Assuming that the evidence warranted the inference of some conduct on the part of some person active in the business of Francisco Distributing Company making him a party to a conspiracy to sell whiskey at prices over the established ceiling, neither Francisco nor such unidentified person is a defendant. Petitioner is the defendant, "guilt with us remains individual and personal even as respects conspiracy" (*Kotteakos v. United States*, supra) and there is no showing that this petitioner participated in or had any knowledge of any such activity. In holding that evidence of activity under the name of Francisco is sufficient to show criminal responsibility of this petitioner the court below rendered a decision in conflict with established principles of criminal law and in conflict with decisions of other Circuit Courts of Appeals on the same matter (*Bacon v. United States*, supra; *United States v. Liss*, supra (holding as to Palmer); *United States v. Wise*, 108 F. 2d. 379, 383 (C.C.A. 7). Cf. *United States v. Food etc. Bureau*, 43 F. Supp. 966, 971; *Paschen v. United States*, 70 F. 2d. 491, 503 (C.C.A. 7); *People v. Armentrout*, 118 Cal. App. 761, 1 P. 2d. 556; *State v. Burns*, 215 Minn. 182; 9 N.W. 2d. 518).)

(e) At most, the evidence as to this petitioner was circumstantial, it failed to exclude the reasonable inference of innocence and was as consistent with innocence as with guilt. The court below in sustaining the conviction on such

evidence rendered a decision in conflict with other decisions of Circuit Courts of Appeals on the same matter (*Kassin v. United States*, 87 F.2d. 183, 184 (C.C.A. 5); *Dahly v. United States*, 50 F.2d. 37, 43 (C.C.A. 8); *Estep v. United States*, 140 F.2d. 40, 45 (C.C.A. 10); *United States v. Gerke*, supra; *Parnell v. United States*, 64 F.2d. 324, 329 (C.C.A. 10, on rehearing); *United States v. Bates*, 141 F.2d. 436 (C.C.A. 7, as to Smith); *Donovan v. United States*, 54 F.2d. 193, 195 (C.C.A. 3, as to Rossiter); *Tingle v. United States*, 38 F.2d. 573 (C.C.A. 8)). This holding, on evidence which left petitioner's knowledge in the realm of speculation and conjecture, is in conflict with other decisions of Circuit Courts of Appeals (*Center v. United States*, 96 F.2d. 127, 130 (C.C.A. 4); *Fulbright v. United States*, 91 F.2d. 210, 213 (C.C.A. 8); *Caringella v. United States*, 78 F.2d. 563 (C.C.A. 7); *Dowdy v. United States*, 46 F.2d. 417, 423 (C.C.A. 4)). These citations are by way of example and not exhaustive.

(f) The only evidence pointed to as warranting an inference of guilt on the part of this petitioner was the Harkins testimony of hearsay and extra-judicial statements attributed to petitioner. As to him, and as to the necessary elements to show his guilt—as to the corpus delicti of the crime with which he was charged—there was no independent prior proof or later corroboration. The holding of the court, necessarily relying on this Harkins testimony, with no independent prior proof of the corpus delicti or later corroboration, is in conflict with applicable decisions of this Court (*Warszower v. United States*, 312 U.S. 342, 85 L.ed. 876; *Isaacs v. United States*, 159 U.S. 487, 40 L.ed. 229) and in conflict with decisions of other

Circuit Courts of Appeals on the same matter (*Tingle v. United States*, supra; *Cartello v. United States*, 93 F.2d. 412 (C.C.A. 8); *Pines v. United States*, 123 F.2d. 825, 829 (C.C.A. 8); *Hogg v. United States*, 53 F.2d. 967, 969 (C. C.A. 5, cert. den. 285 U.S. 556, 76 L.ed. 945); *Forte v. United States*, 94 F.2d. 236 (C.A. for Dist. Col.)³; *Tabor v. United States*, 152 F.2d. 254, 257 (C.C.A. 4)⁴; *Ercali v. United States*, 131 F.2d. 354 (C.A. for Dist. Col.); *Boeland v. United States*, 238 Fed. 259 (C.C.A. 4); *Gulotta v. United States*, 113 F.2d. 683 (C.C.A. 8).)

WHEREFORE, it is prayed that this Court issue its writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit and that the cause be brought here for review and determination.

Dated at San Francisco, California, March 21, 1947.

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ARTHUR B. DUNNE

*Attorneys for Petitioner
Lawrence B. Goldsmith.*

3. Cited in the *Warszower Case* and said in the *Tabor Case* to contain a "full discussion."

4. Following the *Warszower Case*.

(SUPPORTING BRIEF AND APPENDICES FOLLOW)

Brief in Support of the Foregoing Petition

I.

OPINIONS BELOW, JURISDICTION AND STATEMENT OF THE CASE

The opinions below have not been officially reported. They probably will be reported in 158 F.2d or 159 F.2d. They will be found in the record at page 482 and following and in Appendix A to this petition and brief.

A statement of the grounds on which the jurisdiction of this Court is invoked is in paragraph 4 of Part I of the foregoing petition. It is not repeated but is here referred to.

A statement of the case is made in Part II of the foregoing petition. It is not repeated but is here referred to.

II.

SPECIFICATION OF ERRORS

It is intended to urge error in the rulings referred to in Part II of the foregoing petition and to argue the questions presented in Part III of the foregoing petition. The questions raised and intended to be urged will be found in this petitioner's Assignments of Error as follows:

1. Assignments I through VII (R 205-207) and XII (R 210) deal with the jurisdictional question whether the indictment, attempting to charge a conspiracy under the general conspiracy statute, stated an offense against the United States, i.e., whether operation of the general conspiracy statute was excluded by reason of the applicability of the Emergency Price Control Act.

2. Assignments VIII (R 207), XIII to XXXIII inclusive (R 210-233), and XL (R 237) assign error in rulings of the court in the admission of testimony and in refusing to strike out testimony and all raised the question of the sufficiency of the evidence to establish the corpus delicti, to connect petitioner with the acts and declarations of other persons and to permit use against him of asserted extra-judicial statements testified to by the witness Harkins.

3. Assignments IX to XII, inclusive (R 209, 210) deal with error in denying petitioner's motion for an instructed verdict and attack the sufficiency of the evidence to sustain a conviction, including the raising of the questions on motion for new trial and by motion in arrest of judgment.

III.

ARGUMENT

Proof required.

It is elementary that at least two people must confederate before there can be a conspiracy (*Morrison v. California*, 291 U.S. 82, 92, 78 L.ed. 664, 671⁵; *Gros v. United States*, 138 F.2d 260, 263 (C.C.A. 9); *United States v. Fox*, 130 F.2d 56, 57 (C.C.A. 3 cert. den. 317 U.S. 666, 87 L.ed. 535). Cf. *Gebardi v. United States*, 287 U.S. 112,

5. "The joinder was something to be proved, for it was of the essence of the crime" (*Morrison v. California*, above).² The crime of conspiracy is wholly distinct from the substantive crime which may be the object of an alleged confederation (*Braverman v. United States*, 317 U.S. 49, 54, 87 L.ed. 23, 28; *United States v. Rabinovich*, 238 U.S. 78, 59 L.ed. 1211; *United States v. Manton*, 107 F.2d 834, 838 (C.C.A. 2, cert. den. 309 U.S. 664, 84 L.ed. 1012)).

77 L.ed. 206). "An agreement in some form is the essence and gravamen of the charge (*United States v. Falcone*, 311 U.S. 205, 210, 85 L.ed. 128, 132; *Braverman v. United States*, 317 U.S. 49, 53, 87 L.ed. 23, 28; *Lynch v. Magnavox Co.*, 94 F.2d. 883, 888 (C.C.A. 9); *Tingle v. United States*, 38 F.2d. 573 (C.C.A. 8); *Bacon v. United States*, 127 F.2d. 985, 986 (C.C.A. 10)).

Conspiracy is a crime of intent. (*Craig v. United States*, 81 F.2d. 816, 822 (C.C.A. 9, cert. dis. 298 U.S. 637, 80 L. ed. 1371 and den. 298 U.S. 690, 80 L.ed. 1408)). For intent there must be knowledge. "Those having no knowledge of the conspiracy are not conspirators" (*United States v. Falcone*, 311 U.S. 205, 210, 85 L.ed. 128, 132). "Without the knowledge the intent cannot exist" (*Direct Sales Co. v. United States*; 319 U.S. 703, 711, 87 L.ed. 1674, 1681)⁶. A person cannot join a conspiracy, in ignorance of its existence (*Lee v. United States*, 106 F.2d. 906 (C.C.A. 9)), and to be guilty must "share the guilty knowledge and design" (*Morrison v. California*, 291 U.S. 82, 93, 78 L.ed. 664, 672; *Estep v. United States*, 140 F.2d. 40, 45 (C.C.A. 10)).

While knowledge is a prerequisite, alone it is not enough. The line may be hard to fix but knowledge and

6. The Court cites the *Falcone Case* and holds that strong suspicion will not take the place of knowledge (See Court's note 8). It further points out that even knowledge alone is not enough but in addition there must be intent and participation. Mere indifference will not do. "A considerable degree of carelessness coupled with casual transactions is tolerable outside the boundary of conspiracy. There may be also a fairly broad latitude of immunity for a more continuous course of sales, made either with strong suspicion of the buyer's wrongful use or with knowledge, but without stimulation or active inducement to purchase."

acquiescence are on one side and participation and active cooperation are on the other. (*Egan v. United States*, 137 F.2d. 369, 378 (C.C.A. 8); *Direct Sales Co. v. United States*, supra⁶; *United States v. Falcone*, supra; *Thomas v. United States*, 57 F.2d. 1039 (C.C.A. 10)).

Petitioner Goldsmith may have been a fool—"a sap and a sucker" and "just used" (R 386; see note 15 in Appendix B),—but he did not participate or actively cooperate in any scheme to sell over the ceiling and, "fortunately, looking back over mistakes which viewed from the rear seem stupid, it is nevertheless often true that eligibility to appropriate guardianship proceedings is not sufficient to establish participation in a crime where evil intent is an essential element" (*United States v. Wise*, 108 F.2d. 379 (C.C.A. 7). Cf. *Estep v. United States*, 140 F.2d. 40 (C.C.A. 10⁷)).

One other preliminary: "Guilt with us remains individual and personal even as respects conspiracy" (*Kotteakos v. United States*, 326 U.S. _____, 90 L.ed. (Adv. Op.) 1178). This applies not only to responsibility for acts of strangers but as well to acts of those having the civil status of employees or agents. The rule of civil law that

7. "Without the knowledge, the intent cannot exist. . . . Furthermore, to establish the intent, the evidence of knowledge must be clear, not equivocal.' *Direct Sales Co. Inc. v. United States*, 319 U.S. 703, 63 S.Ct. 1265, 1269, 87 L.ed. 1674, decided June 14, 1943. See also *United States v. Falcone*, 311 U.S. 205, 61 S.Ct. 204, 85 L.ed. 128. . . . From the evidence it is as reasonable to conclude that *Estep* was victimized by Henry and Deluke, as that he was a conscious participator in the fraudulent scheme or the conspiracy. We conclude that the verdict of the jury as to *Estep* is not supported by that degree of proof which we deem essential." (Italics ours)

a principal is liable for the acts of his agents does not apply to impose criminal responsibility on a principal in the absence of some participation by the principal *himself* in the alleged wrongful act. (22 C.J.S. 149 (*Criminal Law*, section 84a); *People v. Armentrout*, 118 Cal. App. 761, 1 Pac. 2d. 556, cited in *Paschen v. United States*, 70 F.2d. 491, 503 (C.C.A. 7th), which in turn is cited and relied on with other cases, in *United States v. Food etc. Bureau*, 43 F. Sup. 966, 971). The rule applies where the charge is conspiracy as well as in other criminal cases (*United States v. Food etc. Bureau*, *supra*; *Bacon v. United States*, 127 F.2d. 985 (C.C.A. 10); *United States v. Liss*, 137 F.2d. 995, 1000 (C.C.A. 3, cert. den. 320 U.S. 773, 88 L.ed. 462) —the holding as to Palmer; *United States v. Wise*, *supra* —holding as to Wise; *State v. Burns*, 215 Minn. 182, 9 NW 2d. 518 (a full discussion)).

The proof failed.

The wholesaler indicted as a party to the claimed scheme was *Lawrence D. Goldsmith*. He is a defendant. "*Francisco Distributing Company*" is not a defendant. As to Goldsmith, as distinguished from Francisco, including all that appears of his connection with and activity in, Francisco, this is the full showing^a: A wholesaler's basic permit was issued to L. D. Goldsmith dba Francisco Distributing Company showing that Weiss had been a partner. Goldsmith visited a branch of the Bank of America in connection with the bringing to San Fran-

8. We again respectfully draw attention to Appendix B, the statement of the evidence in the Government's brief in the court below, so that our summary general statements may be tested.

cisco two carloads of whiskey and paid the drafts covering them. If, to this, there be added the Harkins hearsay, it further appears: Goldsmith made out some of the invoices for the whiskey at \$24.50 per case to the buyers and divided \$2.00 per case with Weiss. There is an attempt, based wholly on the Harkins hearsay, to intimate that Francisco Distributing Company did not own the whiskey involved,⁹ but simply permitted someone else to use its facilities for which it was paid \$2.00 per case.

Without the Harkins testimony it can not be inferred that Goldsmith knew anything except (1) that the whiskey was shipped to Francisco in California, (2) that he paid for it, (3) that it was sold and shipped out, and (4) that Francisco billed and was paid \$24.50 per case. Even with the Harkins testimony there is no evidence that Goldsmith knew what Weiss or Blumenthal or Abel or Feigenbaum did, or that any of them or anyone else got over-ceiling payments. Neither the government in its brief nor the Court in its opinion makes any such statement.

The papers—exhibits in the case constituting the record evidence of the transactions—show that Francisco brought in two carloads of whiskey, billed and shipped to it, paid for the whiskey, sold it and shipped it out to customers, and invoiced it and received payment for it at \$24.50 per

9. The majority opinion says the whiskey was "recorded as purchased by Francisco, though exactly who owned the whiskey was not established." If this is accurate then the prosecution did *not* establish beyond a reasonable doubt that Francisco (or Goldsmith), the record owner and holder, did *not* own it. If non-ownership by Goldsmith is vital to the Government's case the Government had the burden of establishing the fact beyond a reasonable doubt. Merely to have the record silent—to have the fact not established—won't do.

case. Goldsmith claims that *as to him* these papers represent the whole transaction; that he did not know of, and he has no responsibility for, any conduct of Weiss, Blumenthal, Abel or Feigenbaum.

The government and the majority opinion, conceding that the record evidence shows as to Goldsmith nothing but legitimate transactions, piling claimed inference on claimed inference, and disregarding equally reasonable inferences pointing to innocence, take the position that this was merely window dressing; that behind this lay a scheme to bring the whiskey to California to be sold at over-the-ceiling prices. As to Goldsmith, the only circumstances claimed to support such inferences are (1) that it does not appear "exactly who owned the whiskey" (in which event the government has not made a case beyond a reasonable doubt that Goldsmith did not own it), (2) it was merely put through Francisco's books as a paper transaction to make an apparent record that it passed through the hands of a legitimate wholesaler and (3) for this service Francisco was paid \$2 per case. From this the leap is made, over all gaps, to the conclusion that Goldsmith agreed, not separately with each of the other defendants, but with all of them, they then also agreeing among themselves, that the whiskey be sold by them at over-the-ceiling prices.

This conclusion is necessary to sustain the conviction. Each part of it is necessary. It must appear that Goldsmith agreed (1) not merely to use his facilities for some¹⁰

10. The charge is conspiracy, not to do some unspecified wrong, or to permit the Francisco facilities to be used for some undefined and unknown wrongful purpose, but to "sell at wholesale certain distilled spirits • • • in excess of and higher than

improper purpose but (2) that this purpose was the purpose charged, i.e., sales at over the ceiling prices¹⁰ and (3) that this was a single agreement to which all defendants were parties. Nothing less will satisfy the *Falcone*, *Direct Sales*, *Kotteakos* and *Fiswick Cases*.

This much is clear: a seller, legitimately engaged in business, is not guilty of conspiracy because some person, to whom or through whom he sells the commodity in which he deals, illegally uses, or disposes of it. Nor is it enough that he may suspect that some illegal act is intended. His cooperation is necessary, and merely selling, with suspicion, does not constitute the necessary cooperation. We have cited the cases in Part III-2-(c) of the petition. Of these cases we respectfully direct attention to the *Falcone Case*, the *Direct Sales Case* (see note 6 above) and the *Bacon Case*.

That Abel, Feigenbaum and Blumenthal were black-marketers, clearly guilty of violation of the Emergency Price Control Act, is, as to petitioner Goldsmith, utterly colorless so far as the charge against *him* is concerned. Yet the very fact of charging them altogether creates the risk that the obvious guilt of the others of their offense will be transferred to him and, without warrant, an inference of conspiracy drawn. This danger lies at the basis of the holding in *Kotteakos v. United States*, 326 U.S.

the maximum price established by law.” The specification of the substantive offense, “sufficient to identify the offense which the defendants conspired to commit,” was essential to statement of the offense of conspiracy (U. S. Const., Amend’t VI; *Wong Tai v. United States*, 273 U.S. 77, 81; 71 L.ed. 545, 548; *United States v. Eisenminger*, 10 F.2d 816; *United States v. Bopp*, 230 Fed. 723) and *this* indictment could not be sustained by a proof of a conspiracy to commit some different offense.

....., 90 L.ed. (Adv. Op.) 1178. (And compare *United States v. Liss*, 137 Fed. 2d 995, 998 (C.C.A. 2, cert. den. 320 U.S. 773, 88 L.ed. 962).) That the danger is real, and not fanciful, is demonstrated by the majority opinion in this case. If the temptation to lump the defendants, and treat them all together, without proper differentiation and without noticing how differently they were situated and acted, was too strong for even the majority of the Circuit Court of Appeals to resist, a jury should not be tempted.

It adds nothing to say, as the majority below said, that "the transaction was coherent; followed a consistent pattern, and extended over a relatively brief period of time." If there were no questions or suggestion or suspicion of illegality as to Francisco Distributing Company, in view of the pressing demand for whiskey, a disposition of only 2 carloads could not have extended over more than a relative brief period. Of necessity its business,—its disposition of this whiskey,—must follow a consistent pattern. And as to it, necessarily, the transactions were coherent. It was its business to dispose of whiskey in a relatively brief period, following its own consistent pattern of business of selling and invoicing at \$24.50, shipping out and reporting the transactions to the Government. And the sale of its own whiskey could not have been anything but coherent. Nor is the fact that several individuals who knew that the whiskey was available negotiated to sell it at a price over the ceiling and used an obvious and ancient device,—a legitimate record transaction below the ceiling and a further cash side payment,—so unusual as to warrant an inference as to this petitioner. There is nothing so novel in the device as to suggest prearrange-

ment with anyone. The differences in the amount of cash side payments alone points to want of such prearrangement.¹¹ That several individuals separately follow an obvious pattern and use an old device in no way suggests agreement with anyone (Cf. *Keegan v. United States*, 325 U.S. 478, 492, 89 L.ed. 1745, 1753).

The majority leans, in part, on Harkin's testimony that Goldsmith said (or acquiesced in the statement) that Weiss was his sales manager and that he divided \$2 per case with Weiss. What is sinister in this? This was their working arrangement on all business, at least where Weiss had a part in it (R 384). And the facts demonstrate that the profit was not \$2 per case but was the difference between the cost \$21.97 and the selling price of \$24.50, or \$2.53 per case.

Finally the majority leans on the Harkins testimony that it was said that it was not known who owned the whiskey and that Francisco simply cleared it through its books. It was not proper to rely on this testimony (see below). But assuming this for the moment, it is still insufficient to exclude this case from the rule announced in the *Falcone* and *Direct Sales Cases*. That cooperation in the *illegal design*,—and it must be cooperation with knowledge,—is necessary to bring a seller within the ambit of a claimed conspiracy for ultimate illegal disposition, is settled. And mere irregular or unusual business practice does not show this.

11. And if this petitioner were party to a single conspiracy it is strange that this device was used on only 1575 of 4040 available cases.

The conviction can be sustained only by a pyramid of speculation.

Assuming everything that Harkins says, it still does not appear that Goldsmith, as distinguished from some unidentified person connected with Francisco Distributing Company, knew any of these facts *at the time the whiskey was procured and disposed of*. It does not appear that he personally knew of or participated in the transactions beyond ordering that the whiskey be paid for. It does not appear who in the Francisco organization acted in ordering the whiskey or in arranging for its sale. It was not shown how many employees there were, what their functions were, or how many buyers or salesmen were managed by salesmanager Weiss. It was not shown what Weiss himself was doing. This petitioner is not to be held on a criminal charge because some employee may have arranged for the use of the facilities of Francisco Distributing Company for some improper purpose, unknown to Goldsmith. Of the cases cited in the foregoing petition Part III-2-(d) we particularly call attention to *Bacon v. United States*. It presents a deadly parallel.

Assume that this petitioner did know that his facilities were to be used for the purpose of clearing through his books whiskey which he did not own and that for this he was to be paid \$2. This does not warrant the conclusion of guilt. He is not charged with misuse of his liquor license. There is no claim that this would have been a violation of his license. It does not warrant any "inference" of wrong-doing or of knowledge of wrong-doing. Some person, such as the operator of a string of taverns who did not have a wholesale license, might have wanted to make use of Francisco's facilities to bring liquor to

California for the entirely legitimate purpose of selling it in taverns under the ceiling prices. But assume that knowledge of such circumstances would give rise to an "inference" that this petitioner could suspect that some illegal use of the whiskey was to be made. Still that cannot impute to him knowledge that this illegal use was *to sell it over the ceiling* or warrant an inference of agreement that his facilities be used for *this* purpose.¹² An inference or suspicion of some unspecified illegality not charged in *this* indictment does not satisfy the *Falcone* and *Direct Sales Cases*. The only inference that will do is one of knowledge of the precise illegal use intended *as charged in the indictment* (see note 10 above) and participation or cooperation in the scheme, for the purpose of furthering *that* object, and in a way that goes beyond merely supplying a commodity in the ordinary course of business.

If without evidence an "inference" can be drawn that this petitioner knew that his organization did not own the whiskey and was merely passing it through its records for a fixed fee, and if, on top of this, and without evidence, there can be piled the "inference" that from the facts so inferred this petitioner knew that the ultimate purpose was illegal, and if, from the facts so inferred by inference on inference, a third inference can be raised that this petitioner knew the precise illegality intended and that it was to dispose of the whiskey at a price over the ceiling price, still enough has not been guessed. This petitioner is charged as a conspirator, not as an aider and abettor of the substantive offense, which is a misdemeanor only (*Bacon v. United States*, *supra*, where the

12. See Note 10 above.

charge was conspiracy and it was held that the charge was not sustained, expressly notices this distinction). To sustain a charge of conspiracy a farther "inference" that this petitioner knew the identity of the persons who were going to make these over the ceiling sales must be heaped on the foundation of guess and speculation. There is no evidence of this. Yet without knowledge of the identity of these persons there could be no agreement and no conspiracy. This petitioner, without such knowledge, might aid unknown persons by supplying them with a commodity, but he could not so participate or so cooperate as to show an agreement or confederation. There is not the slightest evidence that this petitioner even knew of the existence of Abel, or Feigenbaum, or Blumenthal or any of the unidentified persons who were not Weiss but who went around representing themselves as Weiss.¹³

Even if all these "inferences" are heaped one upon the other, each resting on nothing more substantial than the inference which precedes it, there is still not enough. Even if knowledge of identity can be "inferred" another step must be taken and it must be inferred that this petitioner did, in fact, agree, conspire and confederate with *each* of the sellers. But this is not enough. This would show only a series of distinct conspiracies. *That is not the charge here.* The charge here is of a single conspiracy, and under the *Kotteakos Case*, 326 U.S., 90 L.ed. (Adv. Op.) 1178, proof of a series of distinct conspiracies will not sustain the charge of a single conspiracy made by this indictment. Before this indictment can be sustained against

13. See Appendix B and the Government's summary of the testimony of Figone, Cerhusco, Vogel and Duffy.

this petitioner, it must not only be inferred that he knew and agreed with Abel, Blumenthal and Feigenbaum to sell whiskey at a price over the established ceiling, but it must be inferred that Abel, Blumenthal and Feigenbaum knew each other and *agreed not only with this petitioner but with each other* to sell this whiskey over the ceiling, and that this petitioner knew of and joined the agreement they made among themselves. The *Falcone* and *Kotteakos Cases* require this. The record is utterly devoid of any evidence to support such inferences.

And still this is not all. To sustain the conviction of this petitioner not only must it be found that each of the necessary inferences can be drawn, with no better foundation than a prior speculation, but it must be found that all of this is so clear that each and the ultimate inference of guilt appear *beyond a reasonable doubt* (see the *Mortensen* and *American Tobacco Co. Cases* in Part III-2 of the foregoing petition): The record must be such that suspicion or conjecture has not been permitted to take the place of evidence, for "guilt must be established beyond a reasonable doubt, and, where the evidence is as consistent with innocence as with guilt, no conviction can properly be had." (*Dahly v. United States*, 50 Fed.2d 37, 43 (C.C.A. 8)). The proof of a conspiracy may be circumstantial "but it must be proof." The facts proved "must have a legitimate tendency to compel belief in" guilt and "must point not to the possibility or probability, but to the moral certainty of guilt. That is, the inferences which reasonably may be drawn from them as a whole, must not only be consistent with guilt, but inconsistent with every reasonable hypothesis of innocence. This rule applies with

the same force where conspiracy is the charge, as where substantive offenses are in question." (*Kassin v. United States*, 87 F.2d 183, 184 (C.C.A. 5)). If other cases are desired they will be found cited in Part III-2-(e) of the foregoing petition.¹⁴

It is submitted that even using the Harkins testimony, the circumstantial evidence in this case,—and the evidence relied on to hold this petitioner is only circumstantial,—does not exclude the inference of innocence; it does not exclude the inference that this petitioner was operating a legitimate business in a legitimate way, that he did not personally know the arrangements by which the two carloads of whiskey were being handled, that he did not know that the whiskey was to be disposed of, and was disposed of, at prices above the fixed ceiling, that he did not know the identity of any of the sellers, that he did not have any agreement with them and that he did not know, if it is the fact, that they had any agreement among themselves or with anyone else. And, for the majority below and for the Government, there is a confounding circumstance that points only to his innocence. The total shipment was 4040 cases. At most only 1575 were sold at prices above the ceiling. If this petitioner, were party to any conspiracy why, with the acute demand for whiskey, were

14. Compare *Patton v. Texas & P. R. Co.*, 179 U.S. 658, 45 L.ed. 361; *Penn. R. Co. v. Chamberlain*, 288 U.S. 333, 77 L.ed. 819; *Stevens v. The White City*, 285 U.S. 195, 203, 76 L.ed. 699, 704; *Atchison etc. Co. v. Saxon*, 284 U.S. 458, 76 L.ed. 397; *Atchison etc. Co. v. Toops*, 281 U.S. 351, 74 L.ed. 896; *Northern Ry. Co. v. Page*, 274 U.S. 65, 71 L.ed. 929; *Chicago etc. Co. v. Coogan*, 271 U.S. 472, 70 L.ed. 1041.

the other 2465 cases sold only at the usual price of \$24.50, well under the ceiling?¹⁵ How, as to him, does the sale of the 1575 differ from the sale of the 2465?

Extra-judicial statements of an accused, without independent proof of the corpus delicti, will not sustain a conviction.

So far we have assumed that the majority and the Government could rely on the Harkins testimony. Obviously, as to Goldsmith, no conviction can be sustained without this testimony. As to him, it was the heart of the Government's case. Without it the evidence showed no more than a liquor wholesaler buying and disposing of whiskey in the ordinary course of business at proper prices. What corroboration or independent proof, as to him, of the corpus delicti,—of the elements showing *his* guilt,—is there? What independent proof is there that he was not the owner of the whiskey, that he merely cleared it through his books for a fee of \$2 per case, that Weiss was his sales manager and that he divided \$2 per case with Weiss? Not only is there none, but the essentials are *contradicted* by all the other evidence in the case.¹⁶

The record evidence is that Goldsmith was the owner of this whiskey. It was shipped to him and paid for by him. Under ordinary rules applicable to shipping documents this was *prima facie* evidence that he was the owner (R 257; 49 U.S.C.A., Secs. 83, 107-111; *Commercial*

15. The presumption of innocence of wrongdoing as to matters to which no testimony has been directed does not desert petitioner because a jury's verdict, right or wrong, resolves other matters.

16. The Government's summary of the evidence (Appendix B hereto) is a summary of all the evidence. 7

Nat. Bk. v. Canal-Louisiana etc. Co., 239 U.S. 520, 60 L.ed. 417). The other evidence shows not that Goldsmith was paid a "commission" of \$2 per case but that he made a gross profit of \$2.53 per case, the difference between the cost to him of the whiskey laid down in San Francisco and his selling price. There is no evidence confirming the statements attributed to him by Harkins that Weiss was his sales manager or that he divided any part of any profit or commission or whatever it may be called with Weiss.

This fatal weakness in the Government's case is not apparent in its brief below and is not apparent in the opinion of the majority because the admonition of the court below in *Gros v. United States*, 138 Fed.2d 260, 263 (C.C.A. 9 opinion on rehearing), a conspiracy case, that "the evidence (1) other than appellant's confession and admissions, which it contends establishes the conspiracy charge * * * and (2) what portions of appellant's confessions and admissions warrant the inference that a conspiracy existed" be separated was not heeded. Had it been heeded it would be readily apparent that all of the essentials claimed to warrant sinister inferences against this petitioner have no support but uncorroborated extrajudicial statements attributed to him.

If Goldsmith is guilty of conspiracy, the only one of which he can be convicted is that with which he is charged. The corpus delicti of the crime with which he is charged is a conspiracy of which he was a member. The corpus delicti cannot be proved by proving some different conspiracy,—some conspiracy of which he was not a member. As to him his joinder,—his connection and confederation,—was the gist and gravamen of the charge. It could not

be proved by his extra-judicial statements alone. Such statements were not sufficient evidence to sustain a conviction beyond a reasonable doubt without independent proof of the corpus delicti, or independent corroboration. The order of proof is, of course, not material.

This Court in *Warszower v. United States*, 312 U.S. 342, 85 L.ed. 876, recognized the rule that confessions after a crime must be corroborated; "that the corroboration must reach to each element of the corpus delicti"; that "an uncorroborated confession * * * does not as a matter of law establish beyond a reasonable doubt the commission of a crime" under a recognized exception to the normal rule requiring submission to the jury of questions of fact. In *Tabor v. United States*, 152 F.2d 254, 257 (C.C.A. 4), a conspiracy case, a judgment of conviction was reversed because the trial court failed to give effect to the rule. The Court said:

"The main question to be considered on this appeal is whether there was sufficient independent evidence of the corpus delicti other than through the alleged extra-judicial confession and admissions of the defendant. * * * The necessity for independent corroboration of a confession, of the character of the one here or as to the admissions made after the crime, is clearly recognized by the Supreme Court of the United States in the case of *Warszower v. United States*, 312 U.S. 342, 61 S.Ct. 603, 85 L.ed. 876. A full discussion of the question and a review of a number of decisions will be found in *Forte v. United States*, 68 App. D.C. 111, 94 Fed.2d 236, 127 A.L.R. 1120."

If further authorities are necessary they will be found in Part III-2-(f) of the foregoing petition.

Without independent proof of the corpus delicti, acts or declarations of alleged conspirators cannot be relied on.

Without independent proof of the corpus delicti i.e., of a conspiracy of which petitioner was a party, acts and declarations of alleged co-conspirators were inadmissible against him and are insufficient to sustain a conviction. The proposition is obvious and the cases are cited in Part III-2-(b) of the foregoing petition.

The indictment did not state the offense of conspiracy.

Finally, it is submitted that where every act shown, assuming every inference unfavorable to the petitioner is to be drawn, is one condemned by a specific statute, the Emergency Price Control Act, later in time than the general conspiracy statute, the former occupies the field and there is no room for operation of the general conspiracy statute on the same facts. This is a question which has not been passed upon by this Court. In fairness, we must add that in other cases such convictions have been sustained by lower federal courts.

Upon this point we rest upon the petition. To avoid repetition we do not set out matter contained in the petition and brief on behalf of petitioner Feigenbaum,—we have had the opportunity of knowing what it will say,—and respectfully ask on behalf of this petitioner consideration of the matter which will there be presented.

APPENDIX A

OPINIONS

*In the United States Circuit Court of
Appeals for the Ninth Circuit*

No. 11,232

Dec. 16, 1946

Harry Blumenthal, Louis Abel, Lawrence
B. Goldsmith, Samuel S. Weiss and
Albert Feigenbaum,

Appellants,

vs.

United States of America,

Appellee.

Upon Appeals from the District Court of the United States
for the Northern District of California, Southern Division

Before: Denman, Healy and Bone, Circuit Judges.

Bone, Circuit Judge:

OPINION

Appellants appeal from a conviction before a jury upon
an indictment charging them, in one count, with the crime
of conspiring to violate the Emergency Price Control Act

and Regulations by wilfully selling whisky at over-ceiling prices. Omitting formalities, the indictment reads as follows:

"That Harry Blumenthal, Louis Abel, Lawrence B. Goldsmith, Samuel S. Weiss, and Albert Feigenbaum, (hereinafter called 'said defendant') at a time and place to said Grand Jurors unknown, did knowingly, wilfully, unlawfully, corruptly, and feloniously conspire, combine, confederate, arrange, and agree together and with divers other persons, whose names are to the Grand Jurors unknown, to commit offenses against the United States of America and the laws thereof, the offenses being to knowingly, wilfully and unlawfully sell at wholesale certain distilled spirits, to-wit, Old Mr. Boston Rocking Chair Whiskey, in excess of and higher than the maximum price established by law, said maximum price at wholesale then and there being not in excess of \$25.27 per case of twelve bottles, each of said twelve bottles containing one-fifth of one gallon of said Old Mr. Boston Rocking Chair Whiskey, in violation of Section 902(a), 904(a), and 925(b) of Title 50 U.S.C.A. App., and Office of Price Administration Regulations: Maximum Price Regulation 193 and Maximum Price Regulation 445.

"And the said Grand Jurors, upon their oaths aforesaid, do further charge and present: That in pursuance of, and in furtherance of, in execution of, and for the purpose of carrying out, and to effect the object and design and purposes of said conspiracy, combination, confederation, and agreement aforesaid, the hereinafter named defendants did, at the times hereinafter set forth, commit the following overt acts within the Southern Division of the Northern District

of California and within the jurisdiction of this Court: [followed by a recital of alleged overt acts.]”

Appellants assail this indictment on the ground that a conspiracy or agreement to violate a regulation of the Price Administration is specially punishable under the provisions of the Emergency Price Control Act itself as a misdemeanor and therefore cannot be punished as a felony under the general conspiracy statute. They argue that when Congress provided that it should be unlawful to agree to sell or deliver any commodity in violation of any regulation imposed by the Price Administrator, it thereby made a conspiracy to violate a price regulation punishable specially and exclusively as provided in Section 925(b) of the Price Control Act and, therefore, no prosecution would lie under the general conspiracy statute, U.S.C.A. Title 18, Section 88. It is contended that it was the purpose of Congress to do away, in prosecutions under the Price Control Act, with the harsh rule that a conspiracy to commit a misdemeanor is a felony.

The contention lacks merit. The manifest purpose of Congress in enacting the Emergency Price Control Act was to compel compliance with price regulations authorized under the statute. As pointed out in *Kraus & Bros. v. United States*, 327 U.S. 614, 620, 621, criminal liability attaches to any one who wilfully sells commodities in violation of a regulation or order of the Price Administrator establishing maximum prices. Congress forbade and made punishable an agreement to violate the act, and from this appellants conclude that the conspiracy statute (Title 18 U.S.C.A. 88) was impliedly repealed or superseded by Congress to the extent that it does not apply to

conspiracies to violate the Emergency Price Control Act and regulations promulgated thereunder.

We do not agree with this contention. The conspiracy statute includes as a necessary element the commission of an overt act. There is no mention of the overt act in pursuance of the agreement alluded to in the Emergency Price Control Act and we conclude that there is a clear and striking distinction between the mere agreement punishable as a misdemeanor, and the agreement plus an overt act within the purview of the felony statute.

Prosecutions based upon indictments for conspiracies to violate the Emergency Price Control Act have been upheld in *Newman v. United States* (CCA-9), 156 F.2d 8; *Old Monastery Co. v. United States* (CCA-4), 147 F.2d 905; *United States v. Renken* (D.C. S.C. 1944), 55 F. Supp. 1; *United States v. Krupnick* (D.C. N.J. 1943), 51 F. Supp. 982; *United States v. Armour & Co. of Delaware* (D.C. Mass., 1943), 50 F. Supp. 347. Furthermore, there has been a long and consistent recognition that the commission of the substantive offense and a conspiracy to commit it are separate and distinct offenses, and the power of Congress to separate the two and to affix to each a different penalty is well established. A conspiracy to commit a crime is a different offense from the crime that is the object of the conspiracy. See *Pinkerton v. United States*; *American Tobacco Co. v. United States*, Supreme Court, both decided June 10, 1946. See also *Old Monastery Co. v. United States*, *supra*.

On principle and from these authorities, we hold that a conspiracy to violate the Emergency Price Control Act and regulation promulgated thereunder is indictable as a separate and distinct offense.

There was evidence in this case from which the jury could properly have inferred beyond a reasonable doubt:— That Goldsmith operated a wholesale liquor business in San Francisco, California, known as the Francisco Distributing Company (hereafter called Francisco) and Weiss was his sales manager; that in December of 1943, two carloads of whiskey (the whisky referred to in the indictment) were received and recorded as purchased by Francisco though exactly who owned the whisky was not established; that this whisky was cased in cases of twelve bottles, each bottle containing one-fifth gallon; that during the months of December of 1943 and January of 1944, and while this whisky was held by Francisco, Abel, Blumenthal and Feigenbaum personally made sales therefrom of cases of whisky at wholesale to various persons, such sales being in lots of from 25 to 200 cases; that when such sales were made, the facilities of Francisco were thereupon used by them for the purpose of clearing such sales through the books of Francisco with the knowledge and cooperation of Goldsmith and Weiss; that for this particular service Goldsmith and Weiss received two dollars per case which they divided between themselves; that upon the making of such sales by Abel, Blumenthal and Feigenbaum, the whisky was invoiced and billed to each of their customers by Francisco and delivery effected to these customers through Francisco; that such invoices were required by state law to be issued from a legitimate wholesale liquor firm so that their records, as purchasers of whisky, could be properly kept to comply with this law; that Abel, Blumenthal and Feigenbaum were not engaged in business as wholesale liquor dealers and none of them held a basic permit as a wholesaler of liquor; that Abel, Blumenthal and Feigenbaum shared in

a common access to the stock or "pool" of whisky so held by Francisco, and each of them was free to and did make sales therefrom to liquor vendors and the liquor so sold by them was thereafter delivered to their customers through Francisco; that in each of these sales the liquor was billed to customers of Abel, Blumenthal and Feigenbaum by Francisco at \$24.50 per case and checks for this amount were given to Francisco; that in each sale so made by Abel, Blumenthal and Feigenbaum, each of them demanded and received a side-money payment from the customer to whom they sold whisky, which side-money payment, when added to the ostensible sale price of \$24.50 per case, brought the price to these customers of Abel, Blumenthal and Feigenbaum within the range \$55-\$65 per case; that when the checks to Francisco were cleared through its books and the side-money payments collected by Abel, Blumenthal and Feigenbaum, the whisky was delivered by Francisco to these purchasers; that under the Emergency Price Control Act and applicable regulations the authorized wholesale ceiling price on this whiskey was \$25.27 per case at the time these sales were made in the months of December of 1943 and January of 1944.

Appellants vigorously contend that while certain overt acts were shown by the evidence, which might have indicated isolated offenses by individual appellants and punishable as such under the Price Control Act, the evidence was insufficient to show a conspiracy on the part of appellants to commit such offenses. They argue that even though the evidence may have established to the satisfaction of the jury, beyond a reasonable doubt, the truth of the facts as outlined above, nevertheless this proof falls short of creating the necessary inference of guilt

legally sufficient to link appellants together as conspirators who had agreed together on a common plan or purpose to do the things shown by the evidence and thereafter engaged in acts designed and intended to carry this plan into execution; that this evidence failed to show (except in some instances) that appellants were acquainted with one another; that it showed only an identity of results rather than an identity of purpose and the latter must be shown in order to establish the existence of a conspiracy; that while Abel, Blumenthal and Feigenbaum were all conducting the same kind of transaction, no connection was shown between them other than that Goldsmith was the central distributing point from which the whisky was procured; that the independent sales shown to have been made by Abel, Blumenthal and Feigenbaum (and by certain other unknown and unnamed salesmen whose transactions were made to appear in the evidence) present a situation identical to that presented in *United States v. Kotteakus*, (decided June 10, 1946; Supreme Court) in that the evidence showed several distinct transactions participated in by separate and distinct parties, the only "nexus" among them being in the fact that Goldsmith participated in all.

We cannot agree with these contentions. If the jury was convinced beyond a reasonable doubt that the facts and circumstances revealed by the evidence were true, then the jury was justified in inferring that appellants were parties to a single agreement and conspiracy to commit the offenses charged in the indictment and that the overt acts established in the evidence were done and performed by appellants to further and carry into execution the objects and purposes of this conspiracy.

It is true, as argued, that when one conspiracy is charged, proof showing only different and disconnected smaller ones will not sustain conviction, and proof of crime committed by one or more of the defendants, wholly apart from and without relation to others conspiring to do the thing forbidden, will not sustain conviction. But, as herein indicated, the jury in this case was not confronted with that sort of situation. Here the evidence tended to prove, not a multitude of isolated conspiracies but a single general conspiracy in which the accused cooperated toward the same common end.

Appellants contend that the lower court erred in admitting in evidence certain sales of whisky by Abel, Blumenthal and Feigenbaum to purchasers from them, without first having proved that appellants took part in a conspiracy, that is, until the corpus delicti was proved. But the corpus delicti itself may be shown to exist by overt acts such as an exchange of words, circumstances and events showing a course of dealings. Any or all of these may provide the basis from which the existence of the conspiracy might be inferred by the jury. Commission of the overt acts may constitute the best proof of the conspiracy and such evidence is often used for that purpose.¹

An overt act need not be in itself a criminal act,² nor

¹Marino v. U. S., 91 F.2d 691, 698, 9-CCA, cert. den. 302 U.S. 764; Stack v. U. S., 27 F.2d 16, 17, 9-CCA; Fisher v. U. S., 2 F.2d 843, 846; Hoepfel v. U. S., 85 F.2d 237, 242; Rose v. U. S., 149 F.2d 755, 759, 9-CCA; American Tobacco Co. v. U. S., 147 F.2d 93, 107; Glasser v. U. S., 315 U.S. 60; American Tobacco Co. v. U. S. (Supreme Court) decided June 10, 1946; McDonald v. U. S., 133 F.2d 23.

²Rose v. U. S., supra; U. S. v. Rabinowich, supra; Marino v. U. S., supra (see note 10 in case).

the very crime that is the object of the conspiracy. *United States v. Rabinowich*, 238 U.S. 78, 86; *Pierce v. United States*, 252 U.S. 239, 244. It is sufficient that the overt act should accompany or follow the agreement and it must be done in furtherance of the object of it. See *Marino v. United States*, *supra*, notes 12 and 13 in reported case.

In this case the Government relied on circumstantial evidence to show the existence of the conspiracy. The claimed offense is one which from its very nature can rarely be proved by direct evidence. Ordinarily only the results of a conspiracy, and not the private plottings, are observed. Like any other issue of fact conspiracy may be proved by circumstantial evidence. *Rose v. United States*, *supra*. To constitute an unlawful conspiracy no formal agreement is necessary. *Lawlor v. Loewe*, 235 U.S. 522; *American Tobacco v. United States* (Supreme Court, footnote 1). The crime is almost always a matter of inference deduced from the acts of the persons accused, which are done in pursuance of an apparent criminal purpose. *Pearlman v. United States*, 20 F.2d 113, 114 (cert. den. 275 U.S. 549); *Oliver v. United States*, 121 F.2d 245, 249; *American Tobacco v. United States*, 147 F.2d 93, 107. The proof need go no further than reach that degree of probability where the general experience of men suggests that it has passed the mark of reasonable doubt. *Rose v. United States*, *supra*.

Here the circumstances support the inference of a common design. The transaction was coherent, followed by a consistent pattern, and extended over a relatively brief period of time. It involved quite simply the acquisition of a single large lot of whisky and its sale ostensibly at a uniform below-ceiling price per case to be paid by check,

plus the exaction in cash of side-payments as heavy as the traffic would bear; hence the use of solicitors in what was peculiarly a seller's market. Each of the accused men appears as a cog in an enterprise bearing throughout the earmarks of a premeditated scheme in which each actor was to play his appointed role. Superficially all is made to appear regular while beneath the surface the law is flouted to the profit of the participants. To say that there is here no evidence of a conspiracy among the several actors is to deny the lessons of experience.

Furthermore, the order in which evidence to prove the *corpus delicti* is to be received is largely a matter within the discretion of the trial court. The logical sequence of events—from agreement in a common purpose to perpetuation of an act designed to carry it out—does not require that introduction of the evidence must follow the same rigorous sequence. As pointed out above, commission of an overt act may, in itself, constitute the best proof of the conspiracy. The rule in this circuit is clearly indicated in *Stack v. United States*, *supra*; *Marino v. United States*, *supra*; *Rose v. United States*, *supra* and *Gros. v. United States*, 138 F.2d 261. See also *Hoepfel v. United States*, *supra* and *McDonald v. United States*, 133 F.2d 23.

Appellants also contend that the lawful and proper wholesale ceiling price of the whisky was not established by the evidence. They challenge the application at the trial of Maximum Price Regulation 193, Order No. 5 thereunder, and Maximum Price Regulation 445 to determine the lawful wholesale ceiling price of \$25.37 per case on the whisky sold by appellants, and they further contend that Maximum Price Regulation 445 has no application because it was not in effect at the time of the sales.

These contentions are without merit. We find that Maximum Price Regulation 445 was in effect during all of the period covered by the charge in the indictment. Further, that the formula prescribed and required to be applied under these regulations to determine the proper and lawful wholesale ceiling price of \$25.27 per case was clearly expressed by the Price Administrator and the dividing line between unlawful evasion and lawful action was not left to conjecture. The lawful price can be clearly ascertained from the regulations and it was properly applied by the lower court in its instructions to the jury.

It is also urged by appellants that these regulations are void because their requirements are so vague, indefinite and uncertain that the wit of man is incapable of understanding them. We disagree. The challenged regulations are free from the claimed infirmities. It is significant that the records required to be kept on sales of whisky referred to in the indictment were made to show an invoiced wholesale price (not including the illegally collected "side-payments") of \$24.50 per case. The adoption and use of this "wholesale price" on such sales records revealed a knowledge and understanding of the wholesale price requirements of the applicable regulations sufficient to present to the jury a clear inference that the studied purpose of the appellant-sellers was to make this invoice price come within the lawful wholesale ceiling price of \$25.27 per case in order that such recorded sales would appear to conform to the price requirements of the very regulations and the order which appellants here characterize and denounce as being so vague and uncertain as to be incomprehensible.

Appellants also assert the invalidity of the regulations. The same argument was asserted in *Old Monastery v. United States*, supra. The same regulations were there involved and the court found no merit in the contention. The *Yakus* case (321 U.S. 414) lays at rest the question of appellants' right to attack the validity of such regulations in this proceeding. There is an adequate separate procedure available for the adjudication of the validity of administrative regulations when questioned, even in criminal cases. The record shows no attempt by appellants to employ the procedure referred to in the *Yakus* case, and in view of the rule there laid down, we hold that appellants' challenge to the validity of the regulations and Order No. 5 cannot here be considered.

The contention that the evidence showed that appellants who sold the whisky were "finders" for the purchasers is without merit. The evidence clearly permitted a convincing inference to the contrary and it satisfied the jury, beyond a reasonable doubt, that where sales were established as having been made by Abel, Blumenthal and Feigenbaum to certain buyers from them, they were sellers in these transactions and not "buying agents" for these purchasers.

One Harkins, a special investigator for the Alcohol Tax Unit of the Treasury Department, testified concerning the details of an interview he had with Goldsmith and his sales manager, Weiss, during January of 1944. (Harkins appears to have had a later interview with these two appellants in September of 1944 regarding the same matter). He had been checking on the sales of the whisky here involved. In these conversations, these appellants

told Harkins of the receipt by them of the two carloads of whisky and stated to him that they had received a fee of \$2 a case for clearing the whisky through the books of the Francisco.

Objection was made by appellants to the Harkins testimony on the ground that it was not binding on any of them except Goldsmith and Weiss; that the September interview was after the conclusion of the alleged conspiracy and was a narrative of past events; that it was hearsay, and that the corpus delicti had not been established. At the conclusion of the testimony, the court instructed the jury that the statements made by Goldsmith and Weiss to Harkins could only be considered as against Goldsmith and Weiss. The instruction was proper. *Chevillard v. United States*, 155 F. 2d 929, 9-CCA.

Aside from the Harkins testimony directly affecting the activities of Goldsmith and Weiss, there was ample evidence of active participation in the conspiracy charged to sustain, beyond a reasonable doubt, an inference of guilt of Abel, Blumenthal and Feigenbaum; the other three appellants. This evidence also fully sustains the inference that the sales of whisky by Abel, Blumenthal and Feigenbaum were made by them and delivery to their customers accomplished by means of the cooperation and participation of Goldsmith and Weiss in this sales scheme. Such a conclusion is clearly supported by reasonable inferences to be drawn from the evidence.

Another contention is that since the court below admitted the testimony of each witness against only a particular defendant with whom he dealt, and awaited the motion of the Government at the close of its case to admit

all of the testimony against all of the defendants³ upon the ground that a conspiracy had been established among them, they were deprived of the right of cross-examination—this because they could not cross-examine at the time of such limited admission without waiving its limitation. They argue that this situation gave them no opportunity to cross-examine later in the trial and prior to the granting of the Government's motion. The record does not support them in this contention. Their objections at trial reveal no protest against a deprivation of the claimed right. No demand to cross-examine was made at the time of the granting of the Government's motion. See *Levine v. United States*, 79 F. 2d 364, 368, 9-CCA.

An exception was noted by appellants to that portion of the charge to the jury which informed the jury that in every crime there must exist a union or joint operation of act and intent, and for conviction both elements must be proved to a moral certainty and beyond a reasonable doubt; that such intent is merely the purpose or willingness to commit such an act; that a person is presumed to intend to do all that which he voluntarily and wilfully does in fact do, and must also be presumed to intend all the natural, probable and usual consequences of all his acts.

We find nothing objectionable in this instruction. See *United States v. General Motors*, 121 F. 2d 376, at 402; *Gates v. United States*, 122 F. 2d 571, 575.

We have examined this record with care to assure ourselves that substantial rights of appellants (who did not testify) have not been invaded by the wrongful admis-

³This motion was granted except with respect to the testimony of Harkins which was admitted only against Goldsmith and Weiss.

sion of evidence and by the instructions to the jury. The instructions adequately informed the jury concerning the weight to be given circumstantial evidence and the necessity of receiving with caution the testimony of an accomplice or co-conspirator; the quantum and character of proof necessary to establish the existence of a conspiracy; the element of reasonable doubt regarding the guilt of any one of the appellants, and the necessity of applying the rule of reasonable doubt to every material element of the events charged in the indictment. The rule of proof as to the establishment of the commission of overt acts was properly stated. From our examination we are satisfied that the instructions, taken as a whole, correctly presented the law to the jury.

The evidence admitted in this case supports the verdict. It convinced the jury beyond a reasonable doubt that appellants were active participants in a single conspiracy the purpose and result of which was the deliberate use of the black-market side-payment device to violate the Emergency Price Control Act.

Affirmed.

(Endorsed:) Opinion. Filed Dec. 16, 1946. Paul P. O'Brien, Clerk.

*In the United States Circuit Court of Appeals for
the Ninth Circuit*

No. 11,232

Harry Blumenthal, Louis Abel, Lawrence
B. Goldsmith, Samuel S. Weiss and
Albert Feigenbaum,

Appellants,

vs.

United States of America,

Appellee.

ORDER ON PETITION FOR REHEARING

Before: Denman, Healy and Bone, Circuit Judges

The petition for rehearing is denied.

WILLIAM HEALY,

United States Circuit Judge.

HOMER T. BONE,

United States Circuit Judge.

Denman, Circuit Judge, dissenting:

The petition for rehearing should be granted and the judgments reversed. My concurrence in the decision is withdrawn and the accompanying opinion filed as a dissent to the court's opinion filed on December 16, 1946.

(Endorsed:) Order denying petition for rehearing, and Dissenting Memorandum of Denman, CJ. Filed February 28, 1947. Paul P. O'Brien, Clerk.

[Title of Circuit Court of Appeals and Cause.]

DISSENTING OPINION

Upon Appeals from the District Court of the United States for the Northern District of California, Southern Division

Before: Denman, Healy and Bone, Circuit Judges Denman, Circuit Judge, dissenting from opinion of the court filed herein on December 16, 1946.

The statement of facts of the court's opinion has a fatal vacuum necessary to be filled to establish the conspiracy charged, though its circumstantial evidence warrants the inference of at least four other disconnected criminal conspiracies.

Abel, Blumenthal and Feigenbaum are shown to have been black marketeers and should have been prosecuted for selling whisky at over ceiling prices. Instead, the several prosecutions are sought to be avoided by attempting to throw a conspiracy net around them—a convenience to prosecutors but often dangerous to the cause of justice. Cf. *Kotteakos v. United States*, 328 U.S. . . , 90 L. Ed. 1178, 1183.

The court's opinion is bare of facts, as is the evidence,

(1) That any of these three knew or was in any communication with any others of them;

(2) That any knew that any other obtained whisky from the defendants Goldsmith and Weiss;

(3) That any of the three sellers knew that any other of them bought the whiskey from the so-called "common pool" of whiskey in the warehouse—a common pool only in the sense that each separately obtained his whiskey.

from it, but not a pool of which any of the three had common knowledge that any other of them had obtained his whiskey from it;

(4) That any knew that any other bought his whiskey at the same below-ceiling price;

(5) That any knew that any other sold his whiskey at the same or similar over-ceiling prices.

The obvious inference from the above proof and absence of other proof is that the unknown owner of the whiskey referred to in the court's opinion used each of Abel, Blumenthal and Feigenbaum separately as his agent to violate the law. This would constitute several separate conspiracies between the unproved owner and each of the proved sellers, but not a conspiracy among all four of them.

The owner is the common hub from which extend the three illicit sale conspiracies as spokes, but with no binding rim, as in the cases of *Kotteakos v. United States*, 328 U.S. . ., 90 L. Ed. 1178, 1181, and *Canella v. United States*, 157 F. 2d 470, 477.

Even if the circumstantial evidence of identity of purchase and sale price also warranted the more remote inference that each of these three sellers conspired with each other and the owner to violate the price ceiling, the first and obvious inference, of three separate agencies for the owner, must control. As we stated in reversing an instruction which failed to state that the inferences from circumstantial evidence must be "inconsistent with every reasonable hypothesis of innocence," of the crime charged. *Padlock v. United States*, (CCA-9) 79 F. 2d 872, 875, 876.

"These instructions were erroneous. The rule with reference to the consideration of circumstantial evi-

dence by the jury is thoroughly settled. This rule in brief is that the circumstances shown must not only be consistent with guilt, but inconsistent with every reasonable hypothesis of innocence. 2 Brickwood Sackett Instructions to Juries, § 2491, et seq. We have said that this well-settled instruction in regard to the degree of proof required where circumstantial evidence is relied upon is merely another statement of the doctrine of reasonable doubt as applied to circumstantial evidence. It may therefore be true that 'no greater degree of certainty is required when circumstantial evidence is relied upon than where direct evidence is relied upon,' as stated by the trial judge. The additional statement in the instruction that 'evidence about circumstances * * * must at all times be consistent with guilt only and inconsistent with innocence,' omits the qualifying and important phrase, 'inconsistent with every reasonable hypothesis of innocence,' and for that reason is an erroneous statement of the law."

The same is true also of the appellants Weiss and Goldsmith. The conspiracy charged is that they conspired with the three black marketeers, Abel, Blumenthal and Feigenbaum to sell the whiskey at higher than the maximum price. The court's opinion states no facts and the record has none showing that either Weiss or Goldsmith knew that any whiskey was sold at such higher prices, much less than there was any agreement with the three or any one of them for such prohibited sales.

There is evidence that Weiss and Goldsmith received \$2.00 per case to pass the whiskey through their books and to sell it at slightly less than the maximum price to cover up some unknown reason of the unknown owner.

But this is fully capable of supporting an inference that the unknown owner has highjacked the whiskey and wanted it sold at something less than the maximum so that no question could be raised regarding its disposition. True this would be a wrongful conspiracy, but as in the Kotteakos case, not the conspiracy charged in the instant indictment. As in *Paddock v. United States*, supra, the inference from the circumstantial evidence of these wrongful acts involving sales at less than the maximum is one "inconsistent with . . . [a] reasonable hypothesis of innocence" of the charged conspiracy to sell at higher than the maximum price. As is stated in *Kotteakos v. United States*, supra, at page 1191,

"Criminal they may be, but it is not the criminality of mass conspiracy. They do not invite mass trial by their conduct. Nor does our system tolerate it. That way lies the drift toward totalitarian institutions. True, this may be inconvenient for prosecution. But our Government is not one of mere convenience or efficiency. It too has a stake, with every citizen, in his being afforded our historic individual protections, including those surrounding criminal trials. About them we dare not become careless or complacent when that fashion has become rampant over the earth."

The judgments should have been reversed.

(Endorsed:) Dissenting Opinion of Denman, C.J. Filed February 28, 1947. Paul P. O'Brien, Clerk.

APPENDIX B

(Government's summary of evidence in its brief in the Circuit Court of Appeals for the Ninth Circuit. This is a full copy of the whole summary of the evidence except as noted in the case of witness Nathanson. We have made some additions by footnotes. All footnotes are ours, and do not appear in the Government's brief, except the footnotes for which the numbers 3, 4, and 5 are used a second time and, as noted, these footnotes appear in the Government's brief.)

THE TESTIMONY

Tracing the whiskey and establishing the price.

Almon C. Jones of the United States Internal Revenue Service, Alcohol Tax Unit, produced U. S. Exhibit No. 1, Wholesalers' Basic Permit of L. B. Goldsmith, dba Francisco Distributing Company (showing the appellant Weiss to be a former partner in that company). He further testified that the appellants Weiss, Blumenthal, Abel and Feigenbaum held no wholesaler's basic permits. He also produced U. S. Exhibits Nos. 2 and 3, which are certain forms known as the "52-A forms", the forms on which the wholesaler liquor dealers report the detailed receipt of merchandise. U. S. Exhibit 2¹ recorded the purchase of 2076 cases of whiskey through the Penn Midland Import Company of New Jersey from Ben Burk Inc. U. S. Exhibit No. 3¹ showed the purchase of 1964 cases of whiskey

1. These exhibits also showed all sales made by Francisco, and set out the name and address of each purchaser of each of the 4040 cases of whiskey. The total Old Mr. Boston Rocking Chair Whiskey bought by Francisco was two carloads totaling 4040 cases (R 251, 252, 259). The evidence of purchases over the claimed ceiling price was: Reinburg, 200 cases (R 279, 281), of which Giometti got 50 (R 288, 289); Figone, 200 cases for himself and 75 cases for Avila (R 296, 300); Cernusco for himself, Lewis and Vukota, not more than 300 cases, and possibly

from the Penn Midland Import Company of New Jersey, the distiller being Ben Burk, Inc., or a total of 4040 cases (Tr. pp. 243-250). The railroad car numbers were recorded in these exhibits, and the proper custodian of the freight bills relating to these railroad cars produced them. They were introduced in evidence as U. S. Exhibits Nos. 7 and 8. They showed that the 'freight on this whiskey, Old Mr. Boston Rocking Chair Whiskey, was 81¢ per case (Tr. p. 250). U. S. Exhibits Nos. 4, 5 and 6 were 52-A records of the Francisco Distributing Company which had been filed through the month of March 1942 to the month of December 1943. They were admitted in evidence for the limited purpose of showing that there were no sales of Old Mr. Boston Rocking Chair Whiskey during this period of time preceding the receipts shown in Government's Exhibits Nos. 2 and 3 (Tr. p. 249).

The whiskey was released through the San Francisco Warehouse Company. *Fred H. Sander* of that company testified that he received his instructions regarding the unloading of the two freight cars from the appellant Weiss, whom he identified.² He also produced certain

only 200 (R 301-310); Taylor and Humes, 100 cases (R 318) and another 100 originally ordered by them that are not accounted for (R 319 et seq.); Vogel, 100 cases (R 347); Duffy, 100 cases (R 348 et seq.); Lombardi, 100 cases (R 333); Fingerhut, 125 cases (R 364, 365); Travis, 175 cases (R 364, 373, 376. Taking the highest figures the total is 1575. There was no showing as to the remaining 2465 cases of the 4040. Yet the name and address of every person to whom any of these 4040 cases were delivered appeared on U. S. Exs. 2 and 3.

If Goldsmith were party to a conspiracy it's remarkable none of these 2465 cases were sold over the ceiling when there was a demand from people who were willing to pay over the ceiling prices (R 283).

2. "I had no dealings whatsoever with the witness (sic) Goldsmith. I had dealings with Mr. Weiss . . ." (R 256)

orders relating to the release of this whiskey,³ which had been received by him from the appellant Weiss. These latter named documents became Government's Exhibits Nos. 11, 12, 14, and 17 (Tr. pp. 251-263).

Frank Dito, Assistant Cashier and Chief Clerk at the Bank of America, Ninth and Market Branch, San Francisco, produced the signature cards of the Francisco Distributing Company⁴ and further produced certain collection records of the Francisco Distributing Company. The witness Dito further testified that the appellant Goldsmith visited the bank with reference to this transaction and paid the draft⁵ (Government's Exhibits Nos. 16, 17, 18, 19 and 20) (Tr. pp. 265-268).

Joseph N. Nathanson (Identified himself as a Price Specialist for the OPA. Testified that \$19.24 as the distiller's price per case, \$.81 as the freight per case and \$1.92 as the California tax per case, or a total cost to the wholesaler of \$21.97. He fixed the ceiling price as \$25.27 by multiplying the wholesaler's cost by 1.15. Since his testimony went to no other point and we are not now questioning \$25.27 as the ceiling price we do not set out the summary of his testimony.)

The sale to Dopey Norman's.

Norman Reinburg testified that he operated Dopey Norman's, a saloon and restaurant in Vallejo during the months of December, 1943 and January, 1944; that during

3. That is, orders to the warehouse for shipment from the warehouse to the various buyers.

4. These signature cards were for the Francisco bank account (R 266).

5. Goldsmith directed that the drafts be paid and they were paid by being charged to the Francisco account (R 268).

that period of time he made two purchases of Old Mr. Boston Rocking Chair Whiskey from the Francisco Distributing Company (Tr. p. 278). He further testified that the appellant Abel went out of his way two or three times to get the witness Reinburg whiskey, and he couldn't do it because it wasn't a legitimate set up. Both the witness Reinburg and the appellant Abel turned it down, and when the appellant Abel came along with this Francisco Distributing Company, the witness Reinburg accepted it because he had a sale which was correct with the state law (Tr. p. 285). The witness Reinburg had a conversation with the appellant Abel regarding this whiskey early in December; just himself and Mr. Abel were present. All Reinburg talked about was 100 cases of whiskey. Abel wanted to sell him the whiskey. They dickered about the price and finally arrived at a price of \$65 per case. Reinburg did not pay any money to Mr. Abel at that time, but later gave him a check for \$2450.00 for the first 100 cases of whiskey. The check for \$2450.00 was payable to the Francisco Distributing Company. After Abel gave the witness Reinburg the bill, an invoice of the Francisco Distributing Company, December 17, 1943, which priced the whiskey at \$24.50 per case (U. S. Exhibit No. 22); he gave Abel the rest of the money in cash, which totalled \$6500.00 for the first 100 cases (Tr. pp. 279-281).

Reinburg further testified that he made a second purchase of Old Mr. Boston Rocking Chair Whiskey during the month of December, 1943. He purchased the whiskey from the same people, the same channel, the same amount he paid for that whiskey exactly as the other, \$2450 by check and the rest by cash. It totalled \$65.00 per case. He had the same conversation as before regarding this

transaction (Tr. p. 281). "The conversation was the same thing, the 100 cases for the same price. Mr. Abel said the same as he did on the first 100 cases, repeated the same thing. Abel wanted to sell me 100 cases of whiskey, and I wanted to buy 100 cases of whiskey. The price was \$2,450 by check, which was the ceiling price. I gave him the check; I got my bill, and when I got my bill I gave him the rest of the money totalling \$65.00 for each case. The rest of the money was paid by cash; that cash was delivered to Mr. Abel." (Tr. p. 281). The second sale was covered by the invoice of the Francisco Distributing Company, No. 10140, U. S. Exhibit No. 23, which priced the whiskey as \$24.50 per case.

"During this period of time I traveled to San Francisco with Mr. Abel on two occasions. The first occasion was about the 6th or 7th of December. I took Mr. Abel with me in my car. I took him in the down-town section here about three or four blocks off Market, around Third or Fourth.⁶ The place was a jewelry store pawn shop, sports goods. I let Mr. Abel off at this sports goods shop. I had a conversation that I would pick him up there in half an hour. I drove down there on the date of the first trip at Mr. Abel's direction." (Tr. p. 282). * * * "I made a second trip to San Francisco with Mr. Abel about the 16th or 17th of December. I traveled to San Francisco the same way, in my car. I took him to the same section of the city, about three blocks off Market, about Third Street there.⁶ I observed Mr. Abel going into this pawn shop and this sport shop which I named. * * *" (Tr. pp. 282-283).

6. The Francisco place of business was on Tenth Street.

The witness Reinburg further testified that he was anxious to have the whiskey; that he would not accept any whiskey unless there was an invoice, that he wanted to be sure he was dealing with a legitimate house, a legitimate distributor. He testified: "You can buy whiskey off a truck on the street or anything like that. I wanted to buy the whiskey through a legitimate place of business." (Tr. pp. 315-316).

The sale to Giometti.

John Giometti testified that he was a tavern keeper at Vallejo, California. During the month of December, 1943 to January, 1944, he purchased 50 cases of Old Mr. Boston Rocking Chair Whiskey from the Francisco Distributing Company at \$65 per case. He had given a cashier's check payable to the Francisco Distributing Company to Reinburg, the preceding witness. When the whiskey was delivered, he received with it the invoice of the Francisco Distributing Company, No. 10171, pricing the whiskey at \$24.50 per case (U. S. Exhibit No. 24) (Tr. pp. 288-289). At this time the witness Giometti gave Reinburg the balance of \$2025 to make the total of \$65 per case.

Later the witness Giometti had a conversation with the appellant Abel regarding this transaction (Tr. p. 290). The appellant Abel said he could get the witness Giometti some whiskey if Giometti wanted it. The appellant Abel said the whiskey that the witness Giometti got at the Francisco Distributing Company went through his hands, and he could get the same deal. Appellant Abel said he just took the money that the witness Giometti gave Reinburg and took it to the "big shot"; and gave Giometti the figure of \$60 per case. The witness Giometti "didn't

go for it no more" because he figured he was paying too much for it in the first place, and didn't think he would get a legitimate sale. Appellant Abel did not say who the "Big Shot" was, he said the "Big Shot" was in San Francisco (Tr. p. 291).

The sale to Figone and Avila.

Victor Figone testified that he owned a saloon in El Cerrito. During the month of December, 1943, he made a purchase of Old Mr. Boston Rocking Chair Whiskey from some gentleman in the Francisco Distributing Company⁷ (Tr. p. 295). The witness Figone got 200 cases for himself, and ordered 75 cases for Mr. Avila. The witness Figone further testified that he did not see that man he spoke to present in the court room⁷ (Tr. p. 296). At that time whiskey was hard to get, so you just had to go out to work to buy whiskey.

On Figone's second visit to the Francisco Distributing Company⁷ he took a check for his whiskey in the amount of \$4900 and a check for Avila's whiskey, both payable to the Francisco Distributing Company (Tr. p. 297). The fellow he talked to there⁷ told him to make out the check for \$4900⁶ for the 200 cases, and to bring over the other in cash, around \$5100, to make up a balance of \$60 a case. After he received the whiskey, the invoice of the Fran-

7. Figone testified that he understood the man's name was Weiss. He was cross examined by Weiss, who was acting as his own counsel, and was unable to identify him as the man. "I do not see that man here in the court room. I have been looking here the last day or so. I have been here both days. I don't seem to see him" (R. 296). On cross-examination by Weiss: "Like I say, I have been looking yesterday and today, and this man I dealt with was a short stout fellow. That man told me he was Mr. Weiss. I would recognize him if he was in this court room but he is not in here" (R 299). Want of identification was conceded (R 414).

cisco Distributing Company, No. 10145. (which priced the whiskey at \$24.50 per case—U. S. Exhibit No. 26), was mailed to him "paid" (Tr. p. 298)..

Melvin Avila testified that he owned a tavern in El Cerrito; that during the months of December, 1943 or January, 1944, he purchased 75 cases of Old Mr. Boston Rocking Chair Whiskey at \$60 per case. Payment was made by some odd \$1800 in a check payable to the Francisco Distributing Company, the rest by cash. He delivered the check and the cash to Figone (the preceding witness). All of his dealings were with Figone. Subsequently he received the whiskey, and the invoice of the Francisco Distributing Company arrived by mail (Tr. pp. 300-301).

The sales to Cernusco, Vukota and Lewis.

James Cernusco testified that he was in the tavern business in San Francisco during December, 1943, and January, 1944, when he purchased some Old Mr. Boston Rocking Chair Whiskey from the Francisco Distributing Company. He intended to buy some for himself and for two friends of his (Tr. p. 301), Vukota and Lewis, whose places of business were in Livermore; that he made that purchase at his place of business from a man who gave his name as "Weiss, or Wise, or something"; that he did not see the man he saw then in the court room.⁸

The witness Cernusco further testified that the man who said he was from the Francisco Distributing Company went to the witness Cernusco's place of business. They drove up Mission Street up to Third Street between Mission and Market.⁹ The man got out, seemed to walk

8. "I do not see the man that I saw then here in the court room. I have been here for a couple of days, since yesterday, and today, and I have not seen him yet" (R 302). Want of identification was conceded (R 414).

9. See footnote 6.

across the street there. Cernusco did not know whether he went into the Sportorium, or not (Tr. p. 302). The witness Cernusco testified that he had given a check for \$2000 payable to the Francisco Distributing Company which he had received from Vukota, to the man early in December (U.S. Exhibit No. 28); that he gave the man Vukota's check for \$450 payable to the Francisco Distributing Company (U.S. Exhibit No. 29) on the day of the ride along Third Street. (Tr. p. 303). The witness Cernusco further testified that he had, earlier in December, given a check for \$2000 payable to the Francisco Distributing Company (U.S. Exhibit No. 31) which he had received from Mr. Lewis, to this man, and on this later occasion he gave Lewis' check for \$450 payable to the Francisco Distributing Company (U.S. Exhibit No. 30) to the man who said he was the salesman.³ At that time Cernusco gave the man who said he was the salesman \$6100 in cash. The man told Cernusco that the whiskey was in the San Francisco warehouse (Tr. pp. 304-305). They drove to the warehouse on Townsend Street. Cernusco was given two invoices of the Francisco Distributing Company (U.S. Exhibit No. 32, and U.S. Exhibit No. 33) (Tr. p. 306); he gave the former to Lewis and the latter to Vukota the next day at Livermore. These invoices priced the whiskey at \$24.50 per case (Tr. p. 307).

John E. Vukota, a tavern owner at Livermore, California, identified the two checks made by him and given to Cernusco, and the invoice received from Cernusco. Vukota

3. It was stipulated later in the trial that each of these checks, U. S. Exhibit No. 28, U. S. Exhibit No. 29, U. S. Exhibit No. 30 and U. S. Exhibit No. 31, bore the endorsement stamp of the Francisco Distributing Company, which was made by the Francisco Distributing Company (Tr. p. 334). (This footnote appears in the Government's brief.)

testified that at the time he gave the check for \$450 to Cernusco, he gave Cernusco \$3050 in cash. Vukota testified that he received 100 cases of Old Mr. Boston Rocking Chair Whiskey a day or so after he received the invoice, about the first week of January, 1944 (Tr. pp. 308-309).

V. M. Lewis, a tavern owner at Livermore, California, identified the two checks made by him and given to Cernusco and the invoice of the Francisco Distributing Company received by him (Tr. pp. 309-310).

The sale to the Taylors and Mr. Humes.

Mr. Taylor testified that during December, 1943, and January, 1944, he was operating "Ponty's" pool place as a liquor establishment and bar, for which he and Mr. Humes held the license. During the month of December he made a purchase of Old Mr. Boston Rocking Chair Whiskey from the appellant Feigenbaum at a drugstore on Mission Street. Prior to his first conversation with Mr. Feigenbaum he had given a \$500 deposit on this whiskey to a man named "Little Joe", whom he met at a bar.

When he first saw Feigenbaum, in the presence of his wife and Mr. Humes, Feigenbaum said that if he had not shown up he would have lost that \$500. Feigenbaum told them the price of the whiskey would be \$64 and wanted them to take 200 cases. Eventually, they took 100 cases instead of the 200. At the time of the first conversation Feigenbaum had Taylor's wife make out a check payable to the Francisco Distributing Company in the amount of \$4900 (U.S. Exhibit No. 34). In addition to the check for \$4900, Taylor gave Feigenbaum \$1050 in cash.

Taylor returned to San Francisco on December 23rd and visited the Sanset Drug Company, where he had

another conversation with Mr. Feigenbaum. At that conversation Feigenbaum told him the name of the whiskey was the Old Rocking Chair and sold him one case of whiskey for \$64 in cash. Taylor then told him that he would take the 100 cases and Feigenbaum made out a check to Taylor in the amount of \$2450. Feigenbaum asked Taylor to endorse the check so that would put him in the clear. That gave Taylor just the 100 cases for \$64 a case. Taylor did not receive any cash for the \$2450 check when he endorsed it (Tr. pp. 316-322).

Mrs. Taylor testified that she had made out the check to the Francisco Distributing Company for \$4900 on December 9, 1943, in the Sunset Drugstore, in the presence of her husband, Mr. Taylor, Mr. Humes, Mr. Feigenbaum, and a man named Mr. Tucker, and another fellow they called Little Joe; that she wrote that check at Feigenbaum's instruction. He told her to make the check payable to the Francisco Distributing Company for \$4900. She further testified that she had given her husband \$1000 in hundred dollar and fifty dollar bills (Tr. p. 330).

Raymond C. Humes testified that he was a partner in the operation of Ponty's Place, a saloon in Cottonwood; that in December, 1943, he made a trip to San Francisco with Mr. Taylor to see if they could get some whiskey. They met a Mr. Tucker, who introduced them to Little Joe. They placed a \$500 deposit with Little Joe who said he thought he could get them some whiskey, which would cost around \$64 (Tr. pp. 332-333). After giving the deposit he and Mrs. Taylor returned to Cottonwood and the two of them made a return trip to San Francisco with Mrs. Taylor; that was around the 8th or 9th of the month. They

went to the Sunset Drugstore, where Little Joe introduced them to Feigenbaum (Tr. p. 333). Feigenbaum said he would get them 100 cases of whiskey for \$64 a case, and he would have to have a check for it for \$24.50 a case (Tr. p. 334). Mr. Feigenbaum wanted to know if they could not take 200 cases. They were to make out the check for 200, which was \$4900. Feigenbaum was paid an amount of money for the freight in addition to the \$500 deposit, and the check for \$4900. He was paid the further amount of \$1050 by Mr. Taylor in Mr. Humes' presence. Mr. Feigenbaum then said he wanted a check for \$24.50. He said that went to the distributor (Tr. p. 335). Mr. Humes further testified that he received the invoice of the Francisco Distributing Company, No. 10091. This invoice prices the whiskey as \$24.50 per case (U.S. Exhibit No. 35).

The sale to Walter J. Vogel.

Mr. Vogel testified that he owned the "Toreador Club" during December of 1943 and January, 1944; that he bought some Old Mr. Boston Rocking Chair Whiskey in fifths from the San Francisco Liquor Company at his place of business. A man¹⁰ came in and asked him if he could take 100 cases of whiskey (Tr. p. 345). Vogel paid \$59 a case for the whiskey. The man told him to make out the check to the Francisco Distributing Company for \$2450 (Government Exhibit No. 45). When the man brought Vogel the invoice of the Francisco Distributing Company, No. 10092 (Government's Exhibit No. 46), Vogel paid him \$3400 in cash (Tr. p. 347).

10. "I don't know the man" (R 345)

The sale to Francis Duffy.

Duffy testified that he was in the tavern business during December 1943 and January 1944, in Daly City; that Government's Exhibit No. 47, a check to the Francisco Distributing Company for the sum of \$2000, was written by him, but the name of the Francisco Distributing Company was put in by the fellow¹¹ with whom he made the transaction (Tr. pp. 348-349); that Government's Exhibit No. 48, a check in the amount of \$450, payable to the Francisco Distributing Company, was written the same as the other one (Tr. p. 349); that he gave this man \$2000 in cash at the time he gave him the check for \$450. Government's Exhibit No. 49, an invoice of the Francisco Distributing Company (showing a price of \$24.50 per case) came into his possession a few days after he picked up the merchandise on the 22nd of December, 1943.

The sale to Angelo Lombardi.

Angelo Lombardi testified that he was a tavern owner in Santa Rosa, and that he purchased 100 cases of Old Mr. Boston Rocking Chair Whiskey; that he paid cash for the whiskey to a fellow in the Sportorium on Third Street, whom he identified as the appellant Blumenthal; that he paid \$3050 in cash to Mr. Blumenthal. Mr. Minkler, a tavern owner in Santa Rosa, contacted him about the whiskey; they went to San Francisco to the Sportorium. Mr. Lombardi went into the Sportorium, Mr. Minkler went into the back room there. On that occasion Mr. Lombardi did not have any conversation with Blumenthal.

11. "I have looked around and haven't been able to see this man in the court for two days now" (R 350). Want of identification was conceded (R 414).

After Mr. Minkler came out of this room he said they got in contact with somebody and the whiskey was O.K.; then Minkler and Lombardi went back to Santa Rosa.

Around the 20th of December, Lombardi and Minkler returned to San Francisco and went to the Sportorium with \$3050 in cash. On that occasion Lombardi saw Blumenthal at the Sportorium. All three of them went together in the back room and paid the money to Mr. Blumenthal, laid it right on the shelf. 100 cases of whiskey arrived by Sonoma-Marin Freight Company. Lombardi testified that it was his signature on the check for \$2450 shown him; that he wrote the check out and delivered it to the name on there, Clyde Minkler, at the instruction of Minkler (U.S. Exhibit No. 50) (Tr. pp. 353-355). The invoice of the Francisco Distributing Company, No. 10147-A (which priced the whiskey at \$24.50 per case) (U.S. Exhibit 51), came in about the first of January in the mail. The words "Salesman Weiss" were on there when Lombardi received the document¹² (Tr. p. 356).

The sale to Fingerhut and Travis.

Herman Fingerhut testified that he owned a tavern in Vallejo and purchased some Old Mr. Boston Rocking Chair Whiskey; that the place where he purchased this whiskey was the Sportorium; that he paid \$55 a case for this whiskey; that he did not know the man's name, but that he looked similar to the appellant Blumenthal. On the occasion of his first visit to the Sportorium he had a conversation with that man. Fingerhut told him he needed some whiskey and the man told him he could probably get it for him (Tr. p. 362). Fingerhut said he could use

12. Who wrote these words does not appear.

around 200 cases. The man said, well, he could take care of him. He told him (Fingerhut) the price was \$55. Fingerhut had to pay \$24.50 a case for that, and the rest was in cash.

The first check Fingerhut made out was for \$2000. This was on his second visit to the Sportorium (Tr. p. 363). On the second visit Fingerhut went to the Sportorium on Third and Stevenson. The Sportorium is one short block away from Market Street; it's right on the corner of Stevenson and Third (Tr. p. 363). On this second visit to the Sportorium Fingerhut saw Mr. Blumenthal. He had a conversation in the back of the Sportorium and told him, Blumenthal, that he could only take 100 cases but knew somebody who would take the other 100 cases. The other party was a man by the name of Walter Travis. Blumenthal told him the whiskey was going to arrive about the end of the month. Fingerhut gave Blumenthal a deposit on it of \$4000 in the form of four \$1000 bills (Tr. p. 364).

A few days later Travis and the witness Fingerhut went to the Sportorium and the witness said he would take 100 and Travis 100. Blumenthal told Fingerhut to make out a check for \$2000 to the Francisco Distributing Company. The 100 cases of whiskey were delivered to Fingerhut; that was Old Mr. Boston Rocking Chair Whiskey. The invoice of the Francisco Distributing Company (Government's Exhibit 52), came into Fingerhut's possession from the man at the Sportorium, where he got the whiskey. Fingerhut paid the balance of \$450 in a check to the Francisco Distributing Company.

Fingerhut later purchased another 25 cases of Old Mr. Boston Rocking Chair Whiskey at the same place and

from the same man (Tr. p. 365) for \$55 a case, together with 75 cases that Travis got. Travis gave the witness Fingerhut an invoice of the Francisco Distributing Company, No. 10151 (Government's Exhibit No. 53). Fingerhut gave his money to Travis for this latter purchase. Fingerhut talked with Mr. Blumenthal about buying 25 cases; Fingerhut got a telephone call, wanted to know if he needed any more whiskey (Tr. p. 366). On the second purchase Fingerhut wrote out a check for \$612, payable to the Francisco Distributing Company and delivered it to Travis, together with cash making the difference between \$24.50 and \$55 a case for 25 cases (Tr. p. 368).

Walter H. Travis testified that he operated a tavern in Vallejo during the months of December, 1943 and January, 1944; that he purchased 175 cases of Old Mr. Boston Rocking Chair Whiskey from Mr. Blumenthal. On the first occasion he bought 100 cases at \$55 a case, writing a check to the Francisco Distributing Company for \$2000 (Government's Exhibit No. 44). He was told to make it out to the Francisco Distributing Company by the gentleman at the Sportorium (Tr. p. 373). He testified that he took the check and money to Blumenthal; that he paid Blumenthal \$1050 in cash and mailed another check for \$450 to the Francisco Distributing Company. On the occasion of Travis' first visit to the Sportorium Blumenthal gave him Government's Exhibit No. 58, an invoice of the Francisco Distributing Company (which shows a price of \$24.50 per case), and Blumenthal wrote thereon "Received on account \$2000, balance due \$450"; that the first cash payment of \$2000 he gave to Fingerhut; that later he purchased an additional 75 cases at \$55 from Blumen-

that at the Sportorium and 25 cases for Fingerhut. At that later time the invoice of the Francisco Distributing Company, No. 10152 (Government's Exhibit No. 60) was given to him by Mr. Blumenthal (Tr. p. 376). This invoice shows a price of \$24.50 per case.

Testimony of Edward C. Harkins.

Edward C. Harkins testified that he was a Special Investigator for the Alcohol Tax Unit, working on black market cases involving whiskey, and that he investigated this case with the assistance of others. The witness had several conversations with Mr. Goldsmith regarding this case. Early in January, 1944, a conversation took place where Mr. Goldsmith and Mr. Weiss were present (Tr. p. 380). Investigator Gaines of the Alcohol Tax Unit questioned both Mr. Weiss and Mr. Goldsmith regarding various shipments of whiskey. He (Gaines) asked them about these two carloads of Old Mr. Boston Rocking Chair Whiskey, who purchased it, how it was handled. Mr. Weiss, the witness believed, did most of the talking. He said that his firm received \$2.00 a case for clearing it through their books; Mr. Goldsmith concurred in that. Mr. Goldsmith and Mr. Weiss both stated that they divided the \$2.00, each taking \$1. They both stated, agreed, that they did not sell any of the whiskey. It was sold by others and they received the check generally for the payment of the whiskey in advance of the date that they had to take up the sight draft bills of lading. At the time of that conversation they did not tell who actually sold the whiskey (Tr. p. 381).

The witness Harkins further testified that after this conversation he had another conversation with Goldsmith

regarding the facts of this case in September of 1944. The witness Harkins and an investigator of the State Board of Equalization questioned Mr. Goldsmith about who actually brought¹³ the whiskey, who owned it, referring to these two carloads of Rocking Chair Whiskey. He said that Blumenthal brought it in, and when asked if he knew of his own knowledge, he said "No" (Tr. p. 382). Harkins and the State Board Investigator asked Goldsmith what he received for his share of it and Goldsmith said the Francisco Distributing Company received \$2 per case, of which \$2 he gave Weiss half, \$1.

The witness Harkins further testified that after that time there was another conversation with the appellant Goldsmith at the office of the Alcohol Tax Unit on September 13, 1944, in the presence of Goldsmith's attorney and Mr. Johnson of the Alcohol Tax Unit. Mr. Goldsmith was further questioned about these two shipments of Rocking Chair Whiskey and at that time the witness Harkins showed Goldsmith several invoices that the witness Harkins had in his possession. The Government Exhibit No. 22, the Francisco invoice to The Brig⁴, was in the witness Harkins' possession at the time of the interview and the Witness Harkins showed that document to the appellant Goldsmith. Goldsmith stated that he wrote it himself, identifying his handwriting, Government's Exhibit No. 23, a Francisco invoice to The Brig⁵, was in the witness Hark-

13. The Record, p. 382, shows "bought" not "brought."

4. This document was identified at the trial by the witness Norman Reinburg. (This footnote appears in the Government's brief.)

5. This document was identified at the trial by the witness Norman Reinburg. (This footnote appears in the Government's brief.)

ins' possession then and there, and Goldsmith identified it as being in his handwriting (Tr. p. 383). Government's Exhibit No. 52, the San Francisco invoice to Fingerhut, was in the witness Harkins' possession, and the witness Harkins showed that document to appellant Goldsmith. Goldsmith stated that he wrote it, except for the notation, "Received on account \$2000. Balance due \$450."¹⁴ The witness Harkins showed Government's Exhibit No. 58, the Francisco invoice to Travis, to the appellant Goldsmith. Goldsmith identified that document as being in his handwriting, all but the notation likewise on this.¹⁴ Goldsmith stated that he wrote most of the invoices; that a few were written by his bookkeeper. On that occasion Harkins had other conversations with him relating to these two carloads. Goldsmith answered that they received \$2 per case, and Goldsmith stated at that time, this witness Harkins believed, that up to July 1, 1943 Weiss had been his partner, or on two occasions Harkins believed Goldsmith made the same statement, and that subsequent to July 1st Mr. Weiss was the sales manager, but that Goldsmith felt Weiss was entitled to half the profits and he divided the profits with him, including the \$2 per case received on this Rocking Chair Whiskey (Tr. p. 384).

The witness Harkins further testified that he had one conversation later than January 1944 with the appellant Weiss, on May 14th in this building. At that time Mr. Weiss stated that it was true that he received half of the \$2 commission paid to the Francisco Distributing Company for clearing this whiskey through their books, and Weiss finally refused to answer who actually owned the

14. The witness also testified that Goldsmith said he didn't know who wrote it.

whiskey. Weiss said, 'I don't want to involve myself.' Mr. Weiss said he knew Mr. Blumenthal, but he refused to state, to the best of Harkins' recollection, positively, whether Mr. Blumenthal was the owner of the whiskey or not (Tr. p. 385).

Upon cross-examination by counsel for the appellant Goldsmith, Harkins stated¹⁵ that he did not recall that Goldsmith told him on this Rocking Chair transaction that he (Goldsmith) had sold the whiskey for \$24.50 a case, but Goldsmith said he made \$2 a case; that was his profit, and on that profit he gave Weiss \$1. That is exactly correct. The whiskey was billed at \$19.24; the freight is eighty-one cents, and the State Excise Tax is \$1.92 (Tr. p. 387).

15. The witness also testified on cross-examination: "I remember an expression to the effect that Mr. Gaines said to you 'Mr. Duane, your client is certainly a sap and a sucker.' I remember that there was an expression that he was 'just used.' I remember that you told Mr. Gaines in my presence that I or Mr. Gaines or anybody else would select from the Alcohol Tax Unit any record we have, that Mr. Goldsmith would answer any question he wanted to propound to him, and that the records were open for him. I remember that somebody said to me that there were certain invoices that he would like to have. I remember that you agreed to get the records. I do not know whether or not you subsequently telephoned Mr. Gaines and told him that you had the records in your office. I knew that Mr. Johnson went to your office, but I do not think he got any records. I am under the impression that he looked at your records, but I don't think he took any. He made an examination of them. I wouldn't say that Mr. Goldsmith at no time has refused to give me any document or information that I wanted; he hasn't refused on any documents" (R 386-387).

He also testified when cross-examined by Weiss:

"Q. And didn't you say to me that you were sort of sorry for me?

A. No, I said I felt rather sorry for Mr. Goldsmith, but I didn't understand how a man owning a business could know as little about his business as he professed to know" (R 388).

APPENDIX C

STATUTES

18 U.S.C.A. Sec. 38 (Criminal Code, section 37). Conspiring to Commit Offense against United States.

If two or more persons conspire either to commit any offense against the United States, or to defraud the United States in any manner or for any purpose, and one or more of such parties do any act to effect the object of the conspiracy, each of the parties to such conspiracy shall be fined not more than \$10,000, or imprisoned not more than two years, or both. (R. S. Sec. 5440; May 17, 1879, c. 8, 21 Stat. 4; Mar. 4, 1909, c. 321, Sec. 37, 35 Stat. 1096).

50 U.S.C.A. App. Sec. 902. Prices, Rents, and Market and Renting Practices.

(a) Whenever in the judgment of the Price Administrator (provided for in section 201) (section 921 of this Appendix) the price or prices of a commodity or commodities have risen or threaten to rise to an extent or in a manner inconsistent with the purposes of this Act (sections 901-946 of this Appendix), he may by regulation or order establish such maximum price or maximum prices as in his judgment will be generally fair and equitable and will effectuate the purposes of this Act (sections 901-946 of this Appendix). . . .

(The remainder of section 902 deals with the manner in which the Administrator shall establish maximum prices. Since no question is made on this petition in respect of the ceiling price claimed by the Government to have been established, the remainder of this section is not set out).

50 U.S.C.A. App. Sec. 904. Prohibitions.

(a) It shall be unlawful, regardless of any contract, agreement, lease, or other obligation heretofore or hereafter entered into, for any person to sell or deliver any commodity, or in the course of trade or business to buy or receive any commodity, or to demand or receive any rent for any defense-area housing accommodations, or otherwise to do or omit to do any act in violation of any regulation or order under section 2 (section 902 of this Appendix), or of any price schedule effective in accordance with the provisions of section 206 (section 926 of this Appendix), or of any regulation, order, or requirement under section 202(b) or section 205(f) (sections 922(b) or 925(f) of this Appendix), or to offer, solicit, attempt, or agree to do any of the foregoing.

50 U.S.C.A. App. Sec. 925. Enforcement.

(b) Any person who willfully violates any provision of section 4 of this Act (section 904 of this Appendix), and any person who makes any statement or entry false in any material respect in any document or report required to be kept or filed under section 2 or section 202 (sections 902 or 922 of this Appendix), shall, upon conviction thereof, be subject to a fine of not more than \$5,000, or to imprisonment for not more than two years in the case of a violation of section 4(c) (section 904(c) of this Appendix) and for not more than one year in all other cases, or to both such fine and imprisonment. Whenever the Administrator has reason to believe that any person is liable to punishment under this subsection, he may certify the facts to the Attorney General, who may, in his discretion, cause appropriate proceedings to be brought.

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In the Supreme Court of the United States

OCTOBER TERM 1947

No. 55

LAWRENCE B. GOLDSMITH,

Petitioner,

vs.

THE UNITED STATES OF AMERICA.

BRIEF OF PETITIONER GOLDSMITH

This case is before this Court on writ of certiorari to the United States Circuit Court of Appeals for the Ninth Circuit (R507). Goldsmith's petition, supporting brief and appendices were filed in the October Term 1946 and numbered for that term No. 1163. As his brief on the merits, petitioner adopts his petition, the supporting brief and appendices, with the following corrections and comments directed to the Government's position as stated in its brief in opposition to the petition:

The majority opinion below is reported in 158 F2d 883 and the dissenting opinion of Judge Denman is reported in 158 F2d 762.

The proper citations for three cases cited in the petition and brief are:

Kotteakos v. United States, 328 U.S. 750, 90 L.ed. 1557;

American Tobacco Co. v. United States, 328 U.S. 781, 90 L.ed. 1575;

Fiswick v. United States, 329 U.S. 211, 91 L.ed. (Adv. Op.) 183.

United States v. Bayer, 331 U.S. _____, 91 L.ed. (Adv. Op.) 1294, 1300 (citing *Pinkerton v. United States*, 328 U.S. 640, 90 L.ed. 1489) should be added to the cases cited in Note 5 on page 18.

The Government's brief states that Goldsmith and Weiss were partners operating Francisco Distributing Co. (p. 3). They were not. Weiss had been a partner, but had withdrawn from the partnership (see Basic Permit, R244 and R384).

We made the point in the petition (p. 15) and brief (p. 32) that the testimony of agent Harkins was not admissible over the objection that it was without foundation and that there was no independent proof or corroboration of the corpus delicti. The Government's brief says that the necessary corroboration is found in "the evidence summarized in the Statement, *supra*" (p. 11). The vice of the suggestion is that in the "Statement" (pp. 3-6) no distinction is made between the Harkins hearsay and other evidence. The Statement assumes the proper admission of the Harkins testimony and makes full use of it. The result is that the claimed extra-judicial admissions

are made to serve as the foundation for their own introduction in evidence. With deference, the Government's brief and Baron Munchausen are at one in claiming ability to lift themselves by their own bootstraps.

The Government's brief has undertaken to state the cases against this petitioner, as follows:

~~"The required showing for petitioners Goldsmith and Weiss is found in their conclusion of the arrangements for receipt and storage of the whiskey, in their preparation of invoices below ceiling price in a time of overwhelming demand for liquor and in their receipt of a flat \$1.00 a case apiece for their participation. And, as stated above, their participation as 'legitimate' wholesalers was indispensable to the success of the conspiracy."~~

The statement, as to a "flat \$1.00 a case" rests on nothing more substantial than the Harkins hearsay. But even with this included, the want of substance of the case, thus claimed to have been made, as providing a basis for an "inference" that petitioner Goldsmith was a party to a conspiracy to sell whiskey over the ceiling price readily can be shown.

Upon the one hand, how does the case, claimed to have been made, as to 1575 cases paid for at a price over the ceiling differ, so far as Goldsmith is concerned, from the 2465 cases sold under the ceiling and without any side payment? Goldsmith's activity and/or want of activity as to the 1575 on the one side and the 2465 on the other was exactly the same even down to the Harkins hearsay "of a flat \$1.00 a case apiece," if that evidence can be considered. Goldsmith's knowledge or want of knowledge

4

was exactly the same. As to both classes, the "conclusion of the arrangements for receipt and storage of the whiskey" was the same. As to both classes his sales price was the same and the "preparation of invoices" was the same. In the case of each class, the participation of Francisco as a wholesaler was indispensable and the same. In the case of both classes, the whiskey was paid for in the same way and was ordered from the warehouse in the same way.

On the other hand, how did the "participation" of Goldsmith differ in any way from the participation of Sander, division manager of the Liquor Department of the San Francisco Warehouse Company (R251-265)? The participation of a warehouse was indispensable. Sander was the manager of the warehouse. He is not shown to have had any less personal participation in the transactions or knowledge of over-ceiling payments than Goldsmith. The warehouse certainly received payment for its services in handling the whiskey, actually received, stored and shipped the whiskey and prepared the necessary papers.

The cases cited at pp. 8 and 9 of the Government's brief are so different on their facts as to require no extended comment. The *Baker* and *Oliver Cases* involved fraudulent schemes for the distribution of land and the heart of the schemes was a misrepresentation of the thing being sold. The owner or seller could not have been ignorant of what was going on and was not ignorant. In the *Great Atlantic and Pacific Tea Co. Case*, the question arose on the indictment. The facts are wholly different.

The *Silkworth Case* was a bucket-shop case, and brokers who received "commissions" when they had not acted, must have known that the operation was a bucket-shop operation,—the inference was irresistible.

There is an attempt to distinguish *United States v. Falcone*, 311 U.S. 205, 85 L.ed. 128 upon the ground that in this case title to the whiskey did not pass through Feigenbaum, Abel and Blumenthal, the sellers of the whiskey, but they arranged the sales in such way that title passed directly from Francisco to the tavern owner. The technical passage of the legal title, whatever importance it might have in some piece of civil litigation involving the law of sales, is colorless here. The important thing is that a merchant, legitimately selling merchandise, is not a party to a conspiracy because the person with whom he deals has, unknown to him, arranged for an illegal use or disposition of merchandise which is sold in the ordinary course of business.

Finally, there has been no attempt by the Government to deal with the proposition that the defendant distributor is an individual, Lawrence B. Goldsmith, not an organization, or an association doing business under the name of Francisco Distributing Co. and that whatever the activity of persons engaged in a business enterprise under the name of Francisco Distributing Co. may have been, no knowledge of improper activity has been brought home to the individual, Goldsmith. No more has been shown than that he was the proprietor of the business. Even the character or size of the business organization does not appear. Beyond directing that the whiskey be paid for and making out some of the invoices at a price below the

ceiling (both for the 1575 paid for over the ceiling and the 2465 paid for at \$24.50, below the ceiling). no activity or knowledge on his part has been shown. The Government has made no attempt to deal with "the long established law that guilt is personal and that men can only be held responsible for the unlawful acts of associates because of participation in, authorization or ratification of such acts" which lies at the basis of Section 6 of the Norris-LaGuardia Act. See *United Brotherhoods v. United States*, U.S., 91 L.ed. (Adv. Op.) 705, 711. "Guilt with us remains individual and personal, even as respects conspiracy" (*Kotteakos v. United States*, *supra*).

It is respectfully submitted that the judgment must be reversed as to petitioner Goldsmith.

Dated at San Francisco, September 24, 1947.

ARTHUR B. DUNNE,

WALTER H. DUANE,

*Attorneys for petitioner
Goldsmith.*

FILE COPY

U.S. Supreme Court, U. S.

FILED

MAR 26 1947

CHARLES ELMORE CARTLEY

CLERK

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1946

No. [REDACTED]

56

SAMUEL S. WEISS,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

**PETITION OF SAMUEL S. WEISS FOR
WRIT OF CERTIORARI
to the United States Circuit Court of Appeals
for the Ninth Circuit.**

SAMUEL S. WEISS;

2856 Wilshire Boulevard, Los Angeles, California,

Petitioner in Propria Persona.

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In the Supreme Court

OF THE
United States

OCTOBER TERM, 1946.

No.

SAMUEL S. WEISS,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

**PETITION OF SAMUEL S. WEISS FOR
WRIT OF CERTIORARI
to the United States Circuit Court of Appeals
for the Ninth Circuit.**

*To the Honorable Fred M. Vinson, Chief Justice of
the United States, and to the Honorable Associate
Justices of the Supreme Court of the United
States:*

The petition of Samuel S. Weiss for a writ of certiorari to the United States Circuit Court of Appeals for the Ninth Circuit respectfully shows to Your Honors:

**SUMMARY AND SHORT STATEMENT OF
THE MATTER INVOLVED.**

Your petitioner, with the four other persons named in the caption of the transcript, was indicted at the November, 1944 term of the District Court for the Northern District of California for the crime of conspiracy (U.S.C.A., Title 18, Section 88), and, after a trial by jury, was convicted and sentenced to two months' imprisonment and a fine of \$1,000.

The indictment (Tr. pp. 3-6) is in the words and figures following, to-wit:

"In the November, 1944, term of said Division of said District Court, the Grand Jurors on their oaths present: That

Harry Blumenthal,
Louis Abel,
Lawrence B. Goldsmith,
Samuel S. Weiss, and
Albert Feigenbaum

(hereinafter called 'said defendants') at a time and place to said Grand Jurors unknown, did knowingly, wilfully, unlawfully, corruptly, and feloniously conspire, combine, confederate, arrange and agree together and with divers other persons, whose names are to the Grand Jurors unknown, to commit offenses against the United States of America and the laws thereof, the offenses being to knowingly, wilfully and unlawfully sell at wholesale certain distilled spirits, to-wit, Old Mr. Boston Rocking Chair Whiskey, in excess of and higher than the maximum price established by law, said maximum price at wholesale then and there being not in excess of \$25.27 per case of twelve bottles, each of said twelve

bottles containing one-fifth of one gallon of said Old Mr. Boston Rocking Chair Whiskey, in violation of Sections 902(a), 904(a), and 925(b) of Title 50 U.S.C.A. App., and Office of Price Administration Regulations: Maximum Price Regulation 193 and Maximum Price Regulation 445."

Then follow some ten alleged overt acts which need not be set forth *in hacc verba*.

The cause came on for trial in the District Court on May 15, 1945 and consumed a number of days. (Tr. 24-33.) The petitioner Weiss acted as his own counsel, his co-defendants being represented by different attorneys.

A large mass of testimony was introduced. The peculiar manner in which the case was presented by the Government and the way in which the trial judge originally limited and then admitted, for all purposes and against all of the defendants, testimony and evidence which had originally been admitted as against one defendant only, requires initial comment. The Government offered no proof, either by direct or circumstantial evidence, that a conspiracy was ever formed between any two or more of the defendants or that Weiss was even acquainted with any of his co-defendants, other than the defendant Goldsmith. This last named defendant was a wholesale liquor dealer, legally doing business as such under a basic permit from the Secretary of the Treasury and having paid the tax required by law. Goldsmith was doing business in San Francisco under the name of Francisco Distributing Company. Weiss had for-

merly been a partner of Goldsmith in that concern, but Amended Articles of Copartnership were introduced in evidence showing his withdrawal from the partnership prior to any of the events related in the testimony. (Tr. 244.) At all of the times referred to in the indictment and the testimony he acted in the capacity of a mere salesman for the concern, and received a perfectly legitimate commission on sales made by him for the Distributing Company.

Testimony was introduced tending to show that the defendants Feigenbaum, Blumenthal and Abel, each of them acting separately and without any concert with the others,—the evidence, indeed, does not show that any of the three last named defendants knew any of his co-defendants,—made sales of the whiskey mentioned in the indictment to different purchasers,—most of them tavern keepers,—who were extremely anxious to procure whiskey at any price, that particular commodity being at that time extremely difficult to obtain. The *modus operandi* adopted by the three last named defendants was similar in each case. The purchaser was told that the whiskey would cost him an amount considerably in excess of the alleged ceiling price. He was requested to make out a check to the Francisco Distributing Company for an amount under the ceiling price. The remainder of the amount was paid in cash to the defendant who sold the whiskey. The check, of course, went to the Francisco Distributing Company which was operated by Goldsmith. The cash was presumably all retained by Abel or Blumenthal or Feigenbaum,—we say presumably.

because there is not the slightest evidence that any of the excess price was ever received by the Distributing Company or by anyone else other than the defendant who arranged the sale. There is not the slightest evidence in the record that Blumenthal was acquainted with Feigenbaum or Abel, or Feigenbaum with Blumenthal or Abel, or Abel with Blumenthal or Feigenbaum. The evidence as regards these defendants, construing the evidence most unfavorably to each of them, is that each of them sold whiskey for more than the so-called ceiling price without any knowledge of what his co-defendants were doing, much less pursuant to any agreement made with any of them. Goldsmith, the wholesaler, received the legitimate price which was under the alleged maximum price fixed by the regulation. There is no evidence that either Goldsmith or Weiss knew anything about any of the transactions of the other three defendants. The only connection that Weiss had with the whiskey, according to the testimony, is that he arranged for its transfer from the railroad company to the San Francisco Warehouse Company where it was stored by the Francisco Distributing Company, which had purchased the liquor from an eastern concern known as the Penn Midland Import Company. (Tr. 252.)

Yet, at the conclusion of the government's case, the Court over objection and exception, admitted all of the transactions of Abel, Blumenthal and Feigenbaum in evidence against Weiss. (T.R. 417.)

It is apparent both from the indictment and from the opening statement made by the United States attorney at the commencement of the trial (Tr. 239, *et seq.*), that the Government expected to show that Weiss personally made certain sales of the whiskey, among these being an alleged sale to one Figone. (See Eight Overt Act set forth in the indictment, Tr. 5.)

Upon the trial, this evidence was not forthcoming. Figone was called as a witness. He testified that during the month of December, 1943, he purchased 200 cases of the whiskey for himself and 75 cases for one Avila, who also testified as a witness. (Tr. 296.) He was cross-examined by your petitioner, who, as previously stated, acted as his own counsel. He testified:

"Like I say, I have been looking yesterday and today, and this man I dealt with was a short stout fellow. That man told me he was Mr. Weiss. I would recognize him if he was in this courtroom, but he is not in here. I was told and believed that I paid some money to a man by the name of Weiss at the Francisco, that this man was Mr. Weiss. I cannot say, because at the time I bought the whiskey this gentleman told me that, and I noticed the billing showed the salesman Weiss. I overheard that night over in a saloon in the International Settlement that there was a salesman by the name of Mr. Weiss. I cannot identify Mr. Weiss." (T.R. 299.)

This testimony obviously means nothing more than that someone who used petitioner's surname made a sale and that that person was **not** your petitioner.

James Cernuseco, who stated that in December, 1943 or January, 1944 he purchased certain of the whiskey, testified:

"I had a conversation with a man in my place of business. He gave his name as Weiss or Wise or something. I do not see the man that I saw then here in the courtroom. I have been here for a couple of days, since yesterday, and today, and I have not seen him yet." (Tr. 302.)

This while your petitioner, conducting his own defense, was seated at the counsel table in full view of the witness.

Thus the effort to show that your petitioner made any illegal sales of the whiskey signally failed. All of the other testimony relating to the appellant Weiss either directly or indirectly or in any manner whatever is as follows:

The witness Fred A. Sander, who is Division manager of the Liquor Department of the San Francisco Warehouse Company, testified (Tr. 62, *et seq.*), that the company had received two carloads of whiskey, one of which he described as an "Ex Car," which, in the parlance of shippers and warehousemen, signifies that the goods are delivered from the car itself to the purchaser, or consignee, and are not placed in the warehouse from the arrival of the car until the goods are claimed by the holder of the bill of lading. This is not explained very clearly by the witness, and with the inability of coherent expression or explanation characteristic of those engaged in any particular type

of business, he apparently assumed that his auditors were familiar with his jargon. That, however, is clearly what he means. When asked who gave him instructions regarding the loading of the freight cars, he testifies:

"The instructions came through a Mr. Weiss, representing himself as The Francisco Distributing Company. Mr. Weiss personally gave me those instructions. I see Mr. Weiss here in the courtroom, the gentleman with the bluish grey suit, the second man from the front or far side of the counsel table. I held a conversation with Mr. Weiss covering the unloading of these cars. The conversation took place to the best of my knowledge at our office. The date of the conversation was on or about December 15, 1943. Mr. Weiss came in to ask us if we could handle the cars or distribution for him, and after a little consultation about it in our distribution office we finally agreed to accept the car for him, distribute it and asked him to give us his address. He said he would arrange to have them down to us. I subsequently received certain orders from Mr. Weiss." (Tr. 252.)

The orders referred to by the witness are dated December 17, 1943, and cover merchandise delivered "Ex car," which consisted of 1426 cases of the brand of liquor referred to in the indictment, and another document covering 650 cases of the same liquor. The witness further testified (Tr. 257):

"We did not have the cars in our possession. We had advised Mr. Weiss to pay the freight, sur-

render the bills of lading to the railroad so we could get the cars into the warehouse. We subsequently got possession of the merchandise in these cars and made delivery of it in accordance with these documents." (U. S. Exhibit 10 in evidence.)

"The sheaf of invoices entitled 'Francisco Distributing Company, 122 Tenth Street,' came into my personal possession on or about December 17, 1943. These were received from Mr. Weiss by me at our office and have since been in my records and files."

(The documents were marked U. S. Exhibit 11 in evidence.)

The witness (continuing): "There is (sic) in my hands here, five in number, which we call delivery orders, comprising a form of invoice which reads 'San Francisco Distributing Company,' with an order number—the invoice order number—and it discloses thereon 'Francis E. Duffy,' as an example."

After discussion with counsel, the Court stated that the documents would be admitted in evidence as against the defendant Weiss, and that the ruling would also apply to Exhibit 10.

The witness (continuing): My warehouse company received Car B & O 170144. I have a record of the receipt of that car. The document shown me is that record. The car was received pursuant to an arrangement with Mr. Weiss. I had a conversation with Mr. Weiss regarding the receipt of that car. That conversation took place at our office on or about December 31, 1943. Besides

Mr. Weiss and myself, the usual office staff was present. I dealt with Mr. Weiss at the time myself.

Q. What was the content of that conversation with reference to the car which we have mentioned by number? Counsel for the defendant Blumenthal objected to the question and the Court stated that the evidence was admitted as against the defendant Weiss.

The witness (continuing): He came in and asked us if we could handle another car of whiskey for him, and I questioned it at the time, and later on I finally decided to take it on for him, and he finally came in with these documents as to the distribution. This first document represents the record of the carload by me and has been kept as part of my record. A total of 1964 cases were received as part of that shipment. It consisted of cases of fifths, Old Rocking Chair whiskey. The document was admitted against defendant Weiss and marked "U. S. Exhibit 12" in evidence.

The witness: I have here a sheet of invoices which came into my possession on or about January 3, 1943. I received these invoices from Mr. Weiss. He presented these invoices to me with instructions to get the merchandise shipped as soon as possible on arrival of the car. That conversation took place at our office. At that time, the carload had not arrived. I think there is a letter in there. We addressed a letter to the Santa Fe Railroad Company December 31, 1943. That means we received the car on or about January 3, 1944.

(To the Court): This represents the Francisco Distributing Company's order to deliver a record of the serial numbers that were filled on each order, a copy of the carrier bill of lading on which the merchandise moved to the customer's place of business. I delivered all this merchandise in accordance with these documents that I have here. These were all records kept by my office, and they all relate to the cases of whiskey in the B & O car 174149.

The Court admitted the documents in evidence as against the defendant Weiss, and they were marked "U. S. Exhibit 13."

(The witness continuing): This is a part of that same deal wherein it is delivered from the car—this is stock delivered from the same car out of our warehouse. These invoices regard B & O car 174149, and they are part of the same transaction and the record kept by my firm, and they supplement the Government's Exhibit 13 which I just identified. They are part of the same transaction, the same car. That is our method of handling records. On one set of records we kept actual deliveries from rail cars and the other set of records are kept from actual deliveries taken from rail cars, and then future deliveries made from that stock. That last group of papers refers to an additional group of shipments than those contained in the last exhibit.

Mr. Weiss: Your Honor, at this time I would like to say I never gave him those. I am willing to have bills that I gave him admitted but those I do not know anything about I would rather object to their admission.

The Court: Well, in the form you make the objection, I will overrule it. I do not know what you are getting at. You may have an exception to the Court's ruling.

The witness: This is—we will take this as an example—an order for the entire operation for the distribution of that car. It reads "Deliver to Dillin's" with a certain address, and an order number which reads—these are delivery orders, our instructions to deliver merchandise. This here attached is a report of the serial numbers of each case that went out on this order. The first pink document on top is the delivery order given to me by Mr. Weiss. Before deliveries of case whiskey can be made, we are required to **take the number off**—a record of the number off each case and report it to the actual owner of the merchandise. The first is an order for my company to do certain things with the merchandise. The second sheet attached to the order is a list of the numbers of the particular merchandise I allocated to that order. This is a copy of the bill of lading on which the shipment was made. Our shipment to the customer that is represented on this order, that is a regular commercial document made up by all transportation people. It is the document of my own company. The next paper, as I stated before, is another order, the procedure of which is like the first one, I just—the rest of them are just duplicates of the first, referring to different points of delivery and different cases of whiskey. We make up bills of lading on all cases of distilled spirits moving out of our warehouse, whether city deliveries or shipments. Thereupon counsel for the Government offered the document

in evidence, to which counsel for the defendant Goldsmith objected upon the ground that it was incompetent, irrelevant and immaterial, self-serving and not binding upon the defendant Goldsmith. The Court admitted the document in evidence as to the defendant Weiss. The defendant Weiss objected to the same, and the Court overruled the objection, to which the said defendant Weiss duly excepted. (The documents were marked U. S. Exhibit 14 in evidence.)

The Witness: I sent a bill for the services which my company rendered in this matter.

Q. To whom did you send the bill?

Counsel for the defendant Feigenbaum objected to the question upon the ground that the same was self-serving. The Court overruled the objection to which counsel for the defendant Feigenbaum duly excepted.

The Witness: We sent an invoice to the Francisco Distributing Company.

Mr. Colvin: Q. At whose direction did you send your invoice to the San Francisco Distributing Company?

A. Mr. Weiss. (Counsel for the defendant Goldsmith objected to the question on the ground that it was incompetent, irrelevant and immaterial, not binding upon the defendant Goldsmith and hearsay. The Court admitted the testimony as to the defendant Weiss.)

Examination by Mr. Weiss.

I don't recall right at the moment that you also handed some documents to one of my associates in the office when I was not present. It might be possible that

you handed some other documents to my associate, Mr. Higgins. I distinctly remember that you handed the documents on the first car over to me. As to the second car, I believe the same thing occurred but I finally, eventually gave them over to Mr. Higgins at a later time during the day or the following day, to get the bills of lading and arrange for the car. I can't remember at this time whether I asked you to turn those documents over to Mr. Higgins. I will say this, that you have given me the greater amount of all those documents. There might have been some that you gave to Mr. Higgins. I can't say that far back because we handled so much stuff. My statement is that I am not definite with respect to that.

Redirect Examination by Mr. Colvin.

As to the first document, I am positive that those documents came from Mr. Weiss. As to the second carload, I recall Mr. Weiss talking to me, and later these documents came into my possession.

Recross Examination by Mr. Friedman.

The first car was the Pennsylvania Railroad Car and the Baltimore & Ohio was the second car. The first car was PRR 568500, the second car being B & O 174149. Thereupon counsel for the Government stated to the jury the substance of the documents in evidence as follows: Government's Exhibit No. 2 is a Wholesale Liquor Dealers' Form 52-A and 52-B for the month of December, 1943. As part of this exhibit, on page 1 thereof is a record of the purchase of 2076 cases of

whiskey through the Penn Midland Import Company of New Jersey from the Ben Burke, Inc. Government's Exhibit No. 3 is similarly a summary of Forms 52-A and 52-B. On page 1 thereof is a record of the purchase of 1964 cases of whiskey from the Penn Midland Import Company of New Jersey, the distiller being Ben Burke, Inc., and the railroad car being given as 174149.

These three Manila envelopes, Exhibits 4, 5, and 6, are also Forms 52-A and 52-B. The only purpose for which they are admitted is to show that there is no record of 52-A and 52-B of the Francisco Company of Old Mr. Boston Rocking Chair Whiskey from the date beginning March, 1942, to the beginning of December, 1943. Government's Exhibit No. 7 is an exact copy of a freight bill order upon Penn Midland Import Company, concerning 2076 cases of liquor, alcoholic whiskey and "Francisco Distributing Company" appearing thereon, and the freight bill being \$1689.99. Government's Exhibit No. 8 is a freight bill, copy of the original order, on Penn Midland Import Company, Francisco Distributing Company, showing the number of packages, articles and marks, 1964 cases 3/5 quarts Rocking Chair Whiskey. The amount of freight to be charged is \$2065.79 net, car initials B & O 174149. This document relates to the Penn Railroad car 568500 and is a copy of the San Francisco Warehouse Company's receipt for 650 cases of Old Mr. Boston Rocking Chair Whiskey, which were part of a shipment, and being Exhibit No. 9.

Exhibit No. 10 is a sheaf of invoices, instructions and records of serial numbers, and are the distribution of various cases of whiskey by San Francisco Warehouse Company.

Exhibit No. 11 regards the instructions and invoices as to the 650 cases already mentioned in Exhibit No. 9, which 650 cases were in the car PRR 568500.

Exhibit 12 is the record of the receipt by the San Francisco Warehouse Company of 1964 cases of fifths of Old Mr. Boston Rocking Chair Whiskey. Exhibit No. 13, the invoices, the serial numbered records and the copy of the bill of lading arising from the dealings of the San Francisco Warehouse Company with B & O car 174149.

Exhibit No. 14 completes the car B & O 174149, and is a record of the remaining 539 cases, that record being a copy of the invoices and records of the serial numbers of the cases and copy of the bill of lading which was a part of the transaction relating to this whiskey of the San Francisco Warehouse Company. (Tr. 257-264.)

The witness Dito (Tr. 265), testifies **that he had no dealings with the appellant Weiss.**

One Harkins, a Government agent and special investigator for the Alcohol Tax Unit, testified that in January, 1944, he had a conversation with your petitioner and that petitioner stated that his firm received \$2.00 a case for clearing it through their books and that Goldsmith and Weiss both stated that they divided the \$2.00, each taking a dollar. They each

stated that they did not sell any of the whiskey or who actually sold the whiskey. (Tr. 381.)

Your petitioner objected to this evidence upon the ground that the conversation was held subsequent to the termination of the alleged conspiracy, that it was hearsay and that the *corpus-delicti* had not been established. The District Court overruled this objection to which your petitioner duly excepted. (Tr. 385.)

No other evidence of any kind, character or description relating to the defendant Weiss appears in the record, and it is the claim of this appellant that the evidence is not even technically sufficient to support the verdict of the jury, and that, accordingly, the District Court erred in denying the motion for an instructed verdict of not guilty.

However, at the conclusion of the Government's case, the United States Attorney made a motion which was granted by the Court, admitting all of the evidence that had been received as to any defendant against all the other defendants. Accordingly, testimony given by witnesses as to their transactions with appellant's four co-defendants, and **with other persons who are not defendants**, was admitted against appellant. Mr. Leo Friedman, counsel for the appellant Feigenbaum, made vigorous and lengthy objections to this testimony, and moved to strike out large portions of the evidence, **in which motion this appellant joined.** (Tr. 417.) The motion was granted by the Court. It may be well at this time to call attention to the practical effect of this ruling. As the trial proceeded,

different witnesses testified as to their dealings with different defendants. **No witness made any claim that he had ever had any transaction with more than one of the defendants, or that he ever knew, or had ever seen, more than one of them.** When such testimony was produced, counsel for defendants who were not affected by it, promptly objected upon the ground that it was *res inter alios acta*, and not binding upon their clients, and the learned trial judge in response to such objections, **stated it was admitted only as to the defendant to whom it related.** Accordingly, counsel for the other defendants were lulled into a false sense of security and did not cross-examine such witnesses, with a view to impeaching or discrediting their testimony. Such cross-examination might have brought out facts which would have thrown discredit upon the witnesses by showing their bias, prejudice, faulty memory, or any one of those things that ordinarily go to discredit a witness. Then, at the conclusion of the case, without previous warning, all of this testimony was introduced against the defendants as to whom it had been excluded and declared inapplicable by the trial judge at the time of its introduction. **A more unfair procedure could scarcely be imagined. It amounted to nothing else than a denial of the right of cross-examination, and otherwise to take the accused unaware, and lead him into an *ambuscado*.**

A criminal trial, we submit, is not a game of skill.

This identical procedure has been held reversible error by this Honorable Court in *Fiswick v. United States*, 91 L. Ed. (adv.) 183.

At the conclusion of the Government's case, all of the defendants, including this appellant, moved for an instructed verdict of not guilty. This motion was denied and an exception noted. It was renewed at the conclusion of the trial, after both sides had rested, and was again denied and excepted to by all of the defendants, including this appellant. (Tr. 428.)

Thereafter, the cause was argued by counsel, and the Court delivered its charge to the jury (Tr. 429), which retired to deliberate, and thereafter returned with a verdict finding all of the defendants guilty. Each of the defendants, including the appellant, made motions for a new trial and in arrest of judgment (Tr. 33-34), each of which motions was denied by the Court, and exception noted. The Court thereafter pronounced judgment upon appellant of imprisonment for a period of two months and a fine of \$1000. From this judgment appellant duly appealed to the Circuit Court of Appeals for the Ninth Circuit (Tr. 67), and filed his Assignment of Errors. (Tr. 176.)

The appeal, pursuant to rules of practice in effect at that time, was presented on a settled and engrossed bill of exceptions. (Tr. 238, *et seq.*)

The Circuit Court of Appeals on December 16, 1946, rendered an opinion affirming the judgment. (Tr. 482.)

Your petitioner on January 13, 1947, filed a petition for a rehearing with the Circuit Court of Appeals.

On February 28, 1947, the Circuit Court of Appeals denied the petition for a rehearing in an order signed by Circuit Judges Healy and Bone.

Circuit Judge Denman, dissenting, stated:

"The petition for rehearing should be granted and the judgments reversed. My concurrence in the decision is withdrawn and the accompanying opinion filed as a dissent to the court's opinion filed on December 16, 1946." (Tr. 499.)

In the dissenting opinion the learned Circuit Judge, referring to the defendants Abel, Blumenthal and Feigenbaum, states:

"Abel, Blumenthal and Feigenbaum are shown to have been black marketers and should have been prosecuted for selling whiskey at over ceiling prices. Instead, the several prosecutions are sought to be avoided by attempting to throw a conspiracy net around them—a convenience to prosecutors but often dangerous to the cause of justice. Cf. Kotteakos v. United States, 328 U. S., 90 L. ed. 1178, 1183.

"The court's opinion is bare of facts, as is the evidence.

"(1) That any of these three knew or was in any communication with any others of them;

"(2) That any knew that any other obtained whiskey from the defendants Goldsmith and Weiss;

"(3) That any of the three sellers knew that any other of them bought the whiskey from the so-called 'common pool' of whiskey in the warehouse—a common pool only in the sense that each separately obtained his whiskey from it, but not a pool of which any of the three had common knowledge that any other of them had obtained his whiskey from it;

"(4) That any knew that any other bought his whiskey at the same below-ceiling price;

"(5) That any knew that any other sold his whiskey at the same or similar over-ceiling prices.

"The obvious inference from the above proof and absence of other proof is that the unknown owner of the whiskey referred to in the court's opinion used each of Abel, Blumenthal and Feigenbaum *separately* as his agent to violate the law. This would constitute several separate conspiracies between the unproved owner and each of the proved sellers, but not a conspiracy among all four of them.

"The owner is the common hub from which extend the three illicit sale conspiracies as spokes, but with no binding rim, as in the cases of *Kotteakos v. United States*, 328 U. S., 90 L. ed. 1178, 1181, and *Canella v. United States*, 157 F. 2d 470, 477." (Tr. 500.)

Referring to your petitioner and his co-defendant Goldsmith the dissenting opinion states:

"The same is true also of the appellants Weiss and Goldsmith. The conspiracy charged is that they conspired with the three black marketers, Abel, Blumenthal and Feigenbaum to sell the whiskey at higher than the maximum price. The court's opinion states no facts and the record has none showing that either Weiss or Goldsmith knew that any whiskey was sold at such higher prices, much less that there was any agreement with the three or any one of them for such prohibited sales.

"There is evidence that Weiss and Goldsmith received \$2.00 per case to pass the whiskey

through their books and to sell it at slightly less than the maximum price to cover up for some unknown reason the unknown owner. But this is fully capable of supporting an inference that the unknown owner has hijacked the whiskey and wanted it sold at something slightly less than the maximum so that no question could be raised regarding its disposition. True this would be a wrongful conspiracy, but as in the Kotteakos case, **not the conspiracy charged in the instant indictment.**" (Tr. 503.)

Within due time after the denial of the petition for a rehearing your petitioner respectfully applies to Your Honors for a writ of certiorari to review and reverse the judgment aforesaid.

JURISDICTIONAL STATEMENTS.

1. The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code as amended. (28 U.S.C.A. Sec. 347.)
2. The decision and judgment of respondent Circuit Court of Appeals was rendered December 16, 1946. (Tr. 482.) A petition for a rehearing was denied by the Circuit Court of Appeals February 28, 1947. (Tr. 499.)
3. The bases upon which it is contended that the Supreme Court has jurisdiction herein and the cases believed to support such jurisdiction are in part as follows:
 - (a) Where a Circuit Court of Appeals has rendered a decision in conflict with the applicable de-

cisions of this Court or of another Circuit Court of Appeals on the same matter, this Court has jurisdiction on certiorari to review the action of the Circuit Court of Appeals. (See: Rule 38, Section 5(b), Rules of the Supreme Court; *Department of Treasury v. Ingram Richardson Manufacturing Co.*, 313 U. S. 252, 85 L. ed. 1313, 61 S. Ct. 866; *Helvering v. Price*, 309 U. S. 409, 60 S. Ct. 673, 84 L. ed. 836; *National Licorice Co. v. National Labor Relations Board*, 308 U. S. 535, 60 S. Ct. 108, 84 L. ed. 451; *Lane v. Wilson*, 305 U. S. 591, 59 S. Ct. 249, 83 L. ed. 374.)

(b) Certiorari will be granted where a Circuit Court of Appeals has decided an important question of general law in a way probably untenable or in conflict with the weight of authority. (See: Rule 38, Section 5(b), Rules of the Supreme Court; *Postal S. S. Corporation v. El Isleo*, 308 U. S. 378, 60 S. Ct. 332, 84 L. ed. 335.)

(c) Certiorari will be granted where a Circuit Court of Appeals has so far departed from the accepted and usual course of judicial proceedings or has so far sanctioned such a departure of a lower Court as to call for an exercise of this Court's power of supervision. (*United States v. Rizzo*, 297 U. S. 530, 56 S. Ct. 580, 80 L. ed. 844; *Le Tulle v. Scofield*, 308 U. S. 531, 60 S. Ct. 75, 84 L. ed. 447; *McNabb v. United States*, 318 U. S. 332, 87 L. ed. 918.)

(d) A writ of certiorari will issue on the ground of "importance" of the issue presented or on other grounds similar to those covered by the rule. (*Federal Trade Commission v. Raladam Co.*, 316 U. S. 149,

62 S. Ct. 966, 86 L. ed. 1336; *Williams v. Jacksonville Terminal Company*, 314 U. S. 590, 62 S. Ct. 64, 86 L. ed. 476; *National Labor Relations Board v. Express Publishing Company*, 312 U. S. 426, 61 S. Ct. 693, 85 L. ed. 930; *Sprague v. Ticonic National Bank*, 306 U. S. 623, 59 S. Ct. 463, 83 L. ed. 1028.)

THE QUESTIONS PRESENTED:

THAT THE EVIDENCE WAS INSUFFICIENT TO JUSTIFY THE VERDICT, THAT THE TRIAL COURT ERRED IN DENYING THE MOTION OF PETITIONER TO INSTRUCT THE JURY TO RENDER A VERDICT FINDING THEM NOT GUILTY AND THAT THE CIRCUIT COURT OF APPEALS ERRED IN DECIDING ADVERSELY TO THIS CONTENTION OF PETITIONER.

The insufficiency of the evidence to justify the verdict convicting your petitioner is decisively pointed out in the dissenting opinion of Circuit Judge Denman. From what is there said it is obvious that the opinion of the majority of the Circuit Court of Appeals is at variance and is, indeed, directly contrary to the rule stated by this Honorable Court in *Kotteakos v. United States*, 90 L. ed. Advanced Opinions 1178, 66 S. Ct. 1239, 328 U. S. It is also at variance with the decision of the Ninth Circuit Court of Appeals itself in *Canella v. United States*, 157 Fed. (2d) 470, 477, and with several well-considered cases from other circuits.

Kotteakos v. United States is indistinguishable from the case at bar. In the *Kotteakos* case the indictment charged a general conspiracy in which a

number of people operating through a common key figure, Simon Brown, were to make applications to various financial institutions for credit with the intent that the loans or advances would then be offered to the FHA for insurance upon applications containing false and fraudulent information. Seven of the defendants charged were found guilty. The evidence established that several applications for such loans had been made through the key figure Brown, but as the Supreme Court states,

"no connection was shown between them and petitioners, other than that Brown had been the instrument in each instance for obtaining the loans. In many cases the other defendants did not have any relationship with one another, other than Brown's connection with each transaction."

Following the foregoing language the Supreme Court says:

"The proof therefore admittedly made out a case, not of a single conspiracy, but of several, notwithstanding only one was charged in the indictment. Cf. *United States v. Falcone*, 311 U. S. 205, 85 L. ed. 128, 61 S. Ct. 204. *United States v. Peoni* (C.C.A. 2d), 100 F. 2d 401; *Tinsley v. United States* (C.C.A. 8th), 43 F. 2d 890, 892, 893. The Court of Appeals aptly drew analogy in the comment, 'Thieves who dispose of their loot to a single receiver—a single "fence"—do not by that fact alone become confederates; they may, but it takes more than knowledge that he is a "fence" to make them such.'

The *Kotteakos* case does not stand alone. The same rule is followed in *Berger v. United States*, 295 U. S.

78, 55 S. Ct. 629, 79 L. ed. 1314; *Wyatt v. United States*, 23 Fed. (2d) 791; *Parnell v. United States*, 64 Fed. (2d) 324. Each of the two cases last cited clearly holds that an indictment for one large conspiracy is not sustained by proof of several smaller conspiracies participated in by some of the alleged conspirators.

In the very recent case of

Fiswick v. United States, decided December 9, 1946, 91 L. ed. (adv.) 183, 189,

and heretofore cited, this Court reversed a conviction of conspiracy **because the lower Court did the very thing done by the trial judge in the case at bar, admitting evidence of the acts and declarations of each defendant against all of his co-defendants.** The opinion of the Court, written by Justice Douglas, contains the following language:

"It is true, as respondent emphasizes, that none of these admissions implicates any petitioner except the maker. But since, if there was a conspiracy, Draeger and Vogel were its hub, evidence which brought each petitioner into the circle was the only evidence which cemented them together in the illegal project. **And when the jury was told that the admissions of one, though not implicating the others, might be used against all, the element of concert of action was strongly bolstered, if not added.** Without the admissions the jury might well have concluded that there were three separate conspiracies, not one. Cf. *Kotteakos v. United States*, 328 U. S., 90 L. ed., 66 S. Ct. 1239, *supra*. With the admissions, the charge of conspiracy received

powerful reenforcement. And the charge that each petitioner conspired with the others became appreciably stronger, not from what he said but from what the other two said. We therefore cannot say with any confidence that the error in admitting each of these statements against the other petitioners did not influence the jury or had only a slight effect. Indeed, the admissions may well have been crucial. * * * And the admissions so strongly bolstered a weak case that it is impossible for us to conclude the error can be disregarded under the 'harmless error' statute. The use made of the admissions at the trial constituted reversible error."

The *Kotteakos* case also held that there was a fatal variance between the allegations of the indictment and the proof, and that the doctrine of harmless error could not be invoked.

This Honorable Court (*United States v. Norris*, 281 U. S. 619, 74 L. ed. 1076) has doubted that the buyer and seller of whiskey can be co-conspirators as a matter of law; but whether they can or not, we most assuredly have no evidence here of a conspiracy between any one else than the buyer and the seller, and that conspiracy is not charged in the indictment.

II.

THAT THE CIRCUIT COURT OF APPEALS ERRED IN REFUSING TO REVERSE THE JUDGMENT OF CONVICTION FOR THE ERROR OF THE TRIAL COURT IN ADMITTING IN EVIDENCE AGAINST THIS PETITIONER EVIDENCE OF ACTS AND DECLARATIONS OF ALLEGED CO-CONSPIRATORS WITHOUT ANY PROOF OF CONSPIRACY WHICH IS THE CORPUS DELICTI OF THE OFFENSE.

The sages of the law and the learned judges have established the rule that the independent acts and declarations of one man shall not be evidence against another. It is sufficient for each to answer for his own sins, and not for the sins of his neighbor. Declarations or acts of one conspirator in furtherance of the object of a conspiracy are admissible over the objections of an alleged co-conspirator who was not present when they were done or made, only if there is proof from another source that he is connected with the conspiracy. It was therefore error of the most highly prejudicial character to admit as against appellant Weiss the evidence of the acts and declarations of Feigenbaum, Blumenthal and Abel.

“Such declarations are admissible over the objection of an alleged co-conspirator, who was not present when they were made, only if there is proof aliunde that he is connected with the conspiracy. Otherwise hearsay would lift itself by its own bootstraps to the level of competent evidence.”

Glasser v. United States, 315 U.S. 60, 62 S. Ct. 457.

“To render evidence of the acts or declarations of an alleged conspirator admissible against an

alleged co-conspirator, the existence of the conspiracy must be shown and the connection of the latter therewith established."

Minnee v. United States, 57 Fed. (2d) 506, 511, citing *Pope v. United States*, 289 Fed. 312, 315;

Kelton v. United States, 294 Fed. 491, 495;

Isenhouer v. United States, 256 Fed. 842;

United States v. Richards, 149 Fed. 443;

Burns v. United States, 279 Fed. 982;

Stager v. United States, 233 Fed. 510.

Also cited by the Court in the *Minnee* case is the opinion of this Court in *Dolan v. United States*, 123 Fed. 52, in which it was held that declarations, tending to show the existence of a conspiracy between the person making them and the person to whom they were made, were inadmissible against a third person not shown to have been connected with the alleged conspiracy. To state the matter otherwise,—the connection of the defendant with the conspiracy cannot be established by the acts and declarations of his alleged co-conspirators.

III.

THE TESTIMONY OF THE WITNESS HARKINS AS TO DECLARATIONS BY PETITIONER WAS ERRONEOUSLY ADMITTED BECAUSE THE CORPUS DELICTI WAS NOT ESTABLISHED.

This testimony is referred to in the opening portion of this petition, where its substance is set forth. It appears in the record, page 380 *et seq.* It is referred

to likewise in the dissenting opinion of Judge Denman which holds in effect that it does not tend to establish the truth of the charge.

But in addition to that it was absolutely inadmissible, and its inadmissibility is palpable at first blush. In prosecutions for conspiracy the *corpus delicti* is the conspiracy itself. (*Shannabarger v. United States*, 99 Fed. (2d) 957, 961; *Cartello v. United States*, 93 Fed. (2d) 412.) In *Tingle v. United States*, 38 Fed. (2d) 573, the Court says:

"In conspiracy cases, the unlawful combination, confederacy and agreement between two or more persons, that is conspiracy itself, is the gist of the action and is the corpus delicti of the charge."

No principle of law is better settled than the rule that no part of the *corpus delicti* can be proved by the extra judicial statements, admissions, or even confessions of the defendant. Any extensive citation of authorities in that behalf is unnecessary. We direct the attention of the Court particularly to such cases as:

People v. Simonsen, 107 Cal. 345; 40 Pac. 440;

People v. Tapia, 131 Cal. 647; 63 Pac. 1001;

People v. La Rue, 62 Cal. App. 276; 216 Pac. 627;

People v. Chadwick, 4 Cal. App. 63; 87 Pac. 384, 389;

People v. Selby, 198 Cal. 426; 245 Pac. 426;

People v. Frey, 165 Cal. 140; 131 Pac. 127.

People v. Simonsen, *supra*, is a clear statement of the principle. In that case, defendant was charged with the crime of obtaining money by false pretenses. The only evidence of the falsity of the pretenses consisted of admissions made by the defendant himself. It was held that, since the falsity of the pretense was a portion of the *corpus delicti*, it could not be proven by the extra judicial statements of the defendant, and therefore that the evidence was insufficient to convict. There being no preliminary proof of the *corpus delicti*, the alleged statement of Weiss to the witness Harkins was itself inadmissible.

**THE REASONS RELIED ON FOR THE
ALLOWANCE OF THE WRIT.**

The Circuit Court of Appeals has rendered a decision contrary to the applicable decisions of this Court and of the several Circuit Courts of Appeals, including its own prior decisions, upon the precise question here involved.

The dissenting opinion of Judge Denman in the Court below, we submit, correctly states the law applicable to this case.

The questions heretofore stated are questions of grave importance, and the Circuit Court of Appeals has so far sanctioned such a departure by the lower Court from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision.

Under the statement and discussion of "the questions presented," we have cited the applicable principles of law and the leading cases in their support at sufficient length, we believe, to enable this Honorable Court to pass upon this petition. We accordingly deem a supporting brief unnecessary and the same is hereby omitted in the interest of brevity.

WHEREFORE, your petitioner prays that a writ of certiorari issue out of and under the seal of this Honorable Court directed to the Honorable Judges of the United States Circuit Court of Appeals for the Ninth Circuit, commanding them to certify and send to this Court for its review and determination, on a day certain to be therein named, a full and complete transcript of the record of all proceedings in the cause therein depending entitled Harry Blumenthal, et al., Appellants, v. United States of America, Appellee and numbered in said Circuit Court of Appeals 11232; that the judgment of said Circuit Court of Appeals may be reviewed by Your Honors and the judgment aforesaid reversed; and that your petitioner have such other and further judgment, order or relief as to this Honorable Court may seem meet, just and proper in the premises; and your petitioner will ever pray.

Dated, Los Angeles, California,
March 24, 1947.

SAMUEL S. WEISS,
Petitioner in Propria Persona.

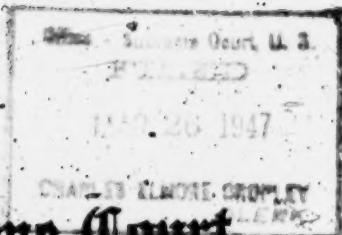
CERTIFICATE

I hereby certify that I am the petitioner named in the foregoing petition in the above entitled cause; that I appeared without counsel and on my own behalf, both in the trial of said cause in the District Court and in the appeal to the United States Circuit Court of Appeals for the Ninth Circuit to review the judgment whereof the foregoing petition is filed; that in my judgment the foregoing petition is well founded in point of law, as well as in fact, and that said petition is not interposed for delay.

Dated, Los Angeles, California,
March 24, 1947.

SAMUEL S. WEISS,
Petitioner in Propria Persona.

FILE COPY



In the Supreme Court

OF THE

United States

OCTOBER TERM, 1946

No. **1165** 57

ALBERT FEIGENBAUM,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

**PETITION FOR WRIT OF CERTIORARI
to the United States Circuit Court of Appeals
for the Ninth Circuit
and
BRIEF IN SUPPORT THEREOF.**

LEO R. FRIEDMAN,

Russ Building, San Francisco 4, California,

Attorney for Petitioner.

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In the Supreme Court
OF THE
United States

OCTOBER TERM 1946

No.

ALBERT FEIGENBAUM,

Petitioner,

VS.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI
to the United States Circuit Court of Appeals
for the Ninth Circuit.

*To the Honorable Fred M. Vinson, Chief Justice of
the United States, and to the Honorable Associate
Justices of the Supreme Court of the United
States:*

The petition of Albert Feigenbaum for a writ of certiorari to the United States Circuit Court of Appeals for the Ninth Circuit respectfully shows:

**STATEMENT OF THE CASE AND THE
MATTERS INVOLVED.**

Petitioner, Albert Feigenbaum, together with Harry Blumenthal, Louis Abel, Lawrence B. Goldsmith and Samuel Weiss, was indicted for the crime of conspiracy. (18 U.S.C.A., sec. 88.) After trial by jury all of the defendants were convicted.* The indictment (R. 3-6) charged the five defendants with conspiring to sell whiskey in excess of the maximum price established by law. The pertinent portion of the indictment charged defendants with conspiring to

* * * sell at wholesale certain distilled spirits, to-wit, Old Mr. Boston Rocking Chair Whiskey, in excess of and higher than the maximum price established by law, said maximum price at wholesale then and there being **not in excess of \$25.27 per case** of twelve bottles, each of said twelve bottles containing one-fifth of one gallon of said Old Mr. Boston Rocking Chair Whiskey, in violation of Sections 902(a), 904(a), and 925(b) of Title 50 U.S.C.A. App., and Office of Price Administration Regulations: Maximum Price Regulation 193 and Maximum Price Regulation 445."

Then follow ten alleged overt acts which need not be set forth herein, it being sufficient to point out that the overt act latest in date is laid as of January 10, 1944. (R. 5.)

All of the evidence introduced at the trial was produced by the United States, and is properly summarized as follows:

*Each of the five defendants took a separate appeal and four defendants are filing a separate petition with this Court for a writ of certiorari. The appeal was heard upon a single record.

The defendant Goldsmith, doing business under the name of Francisco Distributing Company, was lawfully engaged in the wholesale liquor business at San Francisco, California and had procured all the necessary permits and paid all necessary taxes so to do; that during the month of December, 1943, Goldsmith received a shipment of 4040 cases of Old Mr. Boston Rocking Chair Whiskey; that the "ceiling price" at which he could sell this whiskey was \$25.27 per case.

The evidence further showed a series of isolated and unconnected sales involving no more than 1575 cases of the whiskey. These individual sales were made at various times, in unrelated localities and to individual tavern or saloon operators by three unidentified persons and by defendants Abel, Blumenthal and Feigenbaum—no two of the sellers ever acting together. The *modus operandi* of these sales was practically the same in each instance. In some cases the tavern owner sought out the seller, in others the seller sought out the tavern owner. The seller would tell the buyer that he could get him some whiskey but it would cost from \$55 to \$65 a case. The number of cases being agreed upon, the seller would tell the buyer that he must make out a check payable to Francisco Distributing Company for an amount equal to \$24.50 per case times the number of cases ordered and that the difference between the amount of the check and the total agreed price was to be paid to the seller in cash.

The only proof as to Goldsmith was that he received the checks computed on the basis of \$24.50

per case, sent the cases of whiskey to the buyer and issued an invoice in the name of the buyer for the number of cases purchased and the amount in dollars thereof. The record of these transactions was entered on the forms provided by the Alcohol Tax Unit.

The only evidence as to petitioner Feigenbaum was that he operated the Sunset Drug Store in San Francisco; that he purchased 100 cases of the whiskey for himself at \$24.50 per case; that he agreed to get 100 cases for two men named Taylor and Humes who operated a tavern in Shasta County, California; that Taylor and Humes contacted him and he charged them \$64 per case, the payment being made as outlined above.

There was no evidence in the case, either direct or circumstantial, showing that any two of the defendants were acquainted (with the possible exception of Goldsmith and Weiss) or that any one defendant knew of the existence of any of the others or that any of the others were engaged in any sales of the whiskey. There was no evidence to show that Goldsmith ever received any amount for the whiskey over \$24.50 per case.

As the trial proceeded the different purchasers of the whiskey testified as to their dealings with the different defendants and the unidentified salesmen. No witness made any claim that he ever had any transaction with more than one of the defendants, or that he had ever known or seen more than one of the defendants. Those who purchased from the unidentified sellers were unable to identify any of the

defendants. When such testimony was produced counsel for each defendant who was not affected by it promptly objected to the admission thereof on the grounds that the same was hearsay as to him, was *res inter alios acta*, and that the acts and declarations of his alleged co-conspirators were inadmissible as to him until there had been proof made of the existence of the conspiracy charged and such defendant's connection therewith by evidence independent of such acts and declarations.

The trial judge then made the following ruling (R. 255): that all testimony offered by the Government would be admitted only against that defendant to whom it related, leaving to the Government the right at the conclusion of its case to make a motion to admit all evidence in the case against all of the defendants.

At the conclusion of the Government's case the prosecutor moved the admission of "all evidence which has been admitted against any defendant as against all the defendants and * * * all documents marked for identification to be admitted against all defendants." (R. 390-391.) Petitioner and his co-defendants made general and specific objections to such admission on the grounds hereinabove set forth (R. 391-409; Feigenbaum's Assignment of Error XVII, sub-assignments A to W; R. 106-121.) The trial Court granted the Government's motion, with the sole exceptions of limiting certain testimony given by the witness Harkins to Goldsmith and Weiss. (R. 417.) Exceptions were taken to the Court's ruling. (R. 409.)

At the conclusion of the Government's case petitioner Feigenbaum moved the Court for an instructed verdict of not guilty as to him upon the grounds (1) that the evidence was insufficient to support a verdict or judgment of guilty as to him; (2) that the offense sought to be charged in the indictment had not been proved by the Government; (3) that the evidence was insufficient to prove the alleged conspiracy set forth in the indictment; (4) that the evidence was insufficient to prove that Feigenbaum was a member of or identified with the conspiracy charged in the indictment; (5) that the evidence adduced by the Government did not exclude every other hypotheses except that of guilt; and (6) that the only evidence tending to establish the conspiracy charged and Feigenbaum's connection therewith consisted of extrajudicial acts and declarations of alleged co-conspirators, done and made out of Feigenbaum's presence and without his knowledge, authorization or consent. (R. 421-2.) The Court denied such motion to which an exception was properly noted. (R. 422.)

Feigenbaum requested the trial judge to give to the jury his requested instructions Nos. 27, 28 and 29. (R. 133, 134, 135.) Each of these instructions was to the effect that, as to Feigenbaum, in determining whether the conspiracy charged in the indictment existed and that Feigenbaum was a member thereof, the jury could not consider any evidence relative to the acts and declarations of any of Feigenbaum's alleged co-conspirators said or done out of Feigenbaum's presence, but that such conspiracy and Feigenbaum's connection therewith had to be established

by evidence independent of such acts and declarations. The Court refused to give such instructions, to which refusal Feigenbaum duly excepted. (R. 449.) The Court gave no other instructions covering the legal proposition; but, in effect, instructed the jury directly contrary thereto. (R. 443.)

After the verdict of guilty petitioner filed written motions for a new trial and in arrest of judgment (R. 40, 41), which motions were denied by the Court.

In support of his appeal Feigenbaum advanced each of the grounds on which was based his motion for a new trial plus the errors in the giving and refusal of the foregoing instructions. He also advanced the contention that the indictment failed to state a crime against the United States or one that the Court had jurisdiction to try for the reason that the Emergency Price Control Act made it a substantive offense punishable as a misdemeanor for persons to agree to sell commodities over the ceiling price established by the price administrator and, therefore, the offense was not one that could be charged, tried or punished as a felony under the general conspiracy statute. (18 U.S.C.A., sec. 88.)

The Circuit Court of Appeals presided over by Judges Denman, Healy and Bone, rendered a decision ruling against petitioner's contentions and upholding the judgment. (R. 482.) Thereafter petitioner and each of his co-defendants filed petitions for rehearing which were denied by an order signed by Judges Healy and Bone. (R. 499.) **Judge Denman** dissented from the order denying a rehearing and **withdrew his**

concurrence in the original decision of the Court (R. 499) and filed an opinion "as a dissent to the Court's opinion filed on December 16, 1946". (R.500.)

The dissenting opinion of Judge Denman was based on two propositions, viz.: that as to Abel, Blumenthal and Feigenbaum the evidence merely showed them "to have been black marketers and (each of them) should have been prosecuted for selling whiskey at above ceiling prices." Judge Denman's opinion further points out (R. 500):

"The court's opinion is bare of facts, as is the evidence,

(1) That any of these three knew or was in any communication with any others of them;

(2) That any knew that any other obtained whiskey from the defendants Goldsmith and Weiss;

(3) That any of the three sellers knew that any other of them bought the whiskey from the so-called 'common pool' of whiskey in the warehouse—a common pool only in the sense that each separately obtained his whiskey from it, but not a pool of which any of the three had common knowledge that any other of them had obtained his whiskey from it;

(4) That any knew that any other bought his whiskey at the same below-ceiling price;

(5) That any knew that any other sold his whiskey at the same or similar over-ceiling prices.

The obvious inference from the above proof and absence of other proof is that the unknown owner of the whiskey referred to in the court's opinion used each of Abel, Blumenthal and

Feigenbaum *separately* as his agent to violate the law. This would constitute several separate conspiracies between the unproved owner and each of the proved sellers, but not a conspiracy among all four of them." (Italics by Judge Denman.)

Following the foregoing, Judge Denman concludes that the record is controlled by the decision of this Court in *Kotteakos v. United States*, 328 U. S., 91 L. ed. Ad. Op. 1178, 1181, and that the evidence merely established a series of independent conspiracies, that the owner of the whiskey was "the common hub from which extended the three illicit sales conspiracies as spokes, but with no binding rim" connecting them together. Judge Denman further concludes that, so far as the crime charged in the indictment is concerned, the evidence was not inconsistent with every reasonable hypotheses of innocence.

The majority opinion of the Appellate Court holds the evidence sufficient to establish the single conspiracy charged and arrives at this holding **by piling inference upon inference** and by stating that as the jury found but the one conspiracy such finding could not be disturbed by the Court. All of which is in direct conflict with the express decisions of this Court.

To demonstrate the correctness of both Judge Denman's statements and petitioner's contention that the evidence fails to establish any facts even tending to prove the single conspiracy charged, we will set forth a full and complete summary of testimony of each witness in the brief filed in support of this petition.

JURISDICTIONAL STATEMENT.

1. Jurisdiction of the Court.

The jurisdiction of this Court is invoked under section 240 (a) of the Judicial Code as amended. (28 U.S.C.A., sec. 347.)

2. The decisions and judgments of the Circuit Court of Appeals.

The decision and judgment of the Circuit Court of Appeals was rendered on December 16, 1946. (R. 482.) The petition for rehearing was denied by two judges of the respondent Court on February 28, 1947. (R. 499.) The opinion of Judge Denman withdrawing his concurrence in the original opinion filed by the Court was filed on February 28, 1947. (R. 500.)

3. Basis upon which it is contended the Supreme Court has jurisdiction and cases in support thereof.

The basis upon which it is contended that the Supreme Court has jurisdiction herein and the cases believed to support such jurisdiction are as follows:

(a) The majority opinion upholds the convictions upon a record establishing not a single conspiracy but several independent and unrelated transactions without any unity of purpose, common design or undertaking between the various defendants charged in direct conflict with the decision of this Court in the following case, in which the Court exercised its jurisdiction to review the erroneous judgment.

Kotteakos v. United States, 328 U. S., 90
L. ed. Ad. Op. 1178.

(b) The majority opinion holds that the guilt of one charged with conspiracy can be upheld solely on the acts and declarations of his alleged co-conspirators said or done out of his presence and without his knowledge or consent. This is directly contrary to the rulings of this Court in the case of *Kotteakos v. United States*, supra, in which the Court exercised its jurisdiction to review the judgment based on such erroneous holdings.

(c) The majority opinion of the Circuit Court of Appeals erroneously holds that a conspiracy to sell commodities at prices higher than the maximum price established under the Emergency Price Control Act can be prosecuted as felony under the general conspiracy statute of the United States. (18 U.S.C.A., sec. 88), although sec. 205 (b) of the act makes such conspiracy a misdemeanor.

Where there is a misconstruction of a statute by the Appellate Court this Court has jurisdiction to correct such error by writ of certiorari. See, *Federal Trade Com. v. Raladam Co.*, 316 U. S. 149, 150, 86 L. ed. 1336, 1339.

(d) The District Court misdirected the jury on a basic issue and the Appellate Court upheld such action. Thus, the jury were advised that the existence of the conspiracy as to Feigenbaum and his connection therewith could be established by the acts and declarations of his alleged co-conspirators. (R. 440, 441, 442, 444.) Where the Court has misdirected the jury on a basic issue this Court will review such action in a certiorari proceeding. See, *Bollenbach v. United States*, 326 U. S. 607, 90 L. ed. 318.

(e) Without proof of the single conspiracy charged and petitioner's connection therewith, the majority opinion upheld the action of the trial Court permitting the jury to consider overt acts done out of petitioner's presence by an alleged co-conspirator as proof of the conspiracy charged and petitioner's connection therewith. This is directly contrary to the ruling of this Court in *Kotteakos v. United States*, supra, in which this Court exercised its jurisdiction in certiorari to collect such errors.

(f) The majority opinion is in conflict with applicable decisions rendered by the Circuit Court of Appeals in other circuits (as will be amplified in the brief filed in support herewith.) Under such circumstances this Court has jurisdiction on certiorari to review the action of respondent Court. See, *Dept. of Treasury v. Ingram-Richardson Mfg. Co.*, 313 U. S. 252, 253, 85 L. ed. 1313, 1315.

THE QUESTIONS PRESENTED.

The questions presented and raised by this petition are as follows:

1. Where five people are charged and convicted of a single conspiracy, can such conviction be sustained where the evidence only establishes several separate and distinct conspiracies in each of which no more than two of the five named defendants participated?
2. In the trial of five persons charged with conspiracy can the conviction of one be upheld where the

only proof of the conspiracy and such person's connection therewith consists of the acts and declarations of his alleged co-conspirators?

3. Can a person be convicted of conspiracy solely upon proof of overt acts alleged in the indictment which were done by alleged co-conspirators out of the presence of the person convicted and without his knowledge or consent?

4. In a trial for conspiracy is not the refusal to charge the jury, that, in determining the existence of the conspiracy and defendant's connection therewith, the acts and declarations of such person's alleged co-conspirators cannot be considered, a misdirection of the jury on a basic issue which necessitates a reversal of the cause?

5. In a trial for conspiracy is it not a misdirection of the jury on a basic issue, necessitating the reversal of the cause, for the Court to instruct the jury that in determining any one defendant's guilt or innocence the acts or declarations of his co-defendants, said or done out of his presence, can be considered in establishing the existence of the conspiracy and such defendant's connection therewith?

6. Where a statute of the United States makes it a misdemeanor for persons "to agree" to do a prohibited act, does not such statute remove any prosecution for so agreeing from the general conspiracy statute of the United States punishing conspiracies as a felony?

**POINTS RELIED UPON FOR THE ISSUANCE OF THE
WRIT OF CERTIORARI.**

1. The holding of the majority opinion of the Appellate Court, that where a single conspiracy is charged proof of several independent conspiracies in which no two of the same defendants were involved is sufficient to support the charge, is in direct conflict with applicable decisions of this Court such as *Kotteakos v. United States*, 328 U. S., 90 L. ed. Ad. Op. 1178; *Fiswick v. United States*, U. S. 91/L. ed. Ad. Op. 183; and is in conflict with comparable decisions of other Circuit Courts of Appeals, such as the cases of *Tinsley v. United States* (CCA-8), 4 Fed. (2d) 891; *Thomas v. United States* (CCA-10), 57 Fed. (2d) 1039.

2. The majority opinion holding that the guilt of one charged with conspiracy can be established solely by the acts and declarations of his alleged co-conspirators is contrary to the decisions of this Court, such as *Kotteakos v. United States*, *supra*, *Glasser v. United States*, 315 U. S. 60, 86 L. ed. 680.

3. The majority opinion holding that an agreement to violate the Emergency Price Control Act by selling whiskey above the ceiling price, which is made a misdemeanor by the act, can be prosecuted as a felony under the general conspiracy statute, is a misconstruction of the statute.

4. The majority opinion holding that there was no misdirection of the jury in the trial Court's refusal to instruct that Feigenbaum's guilt had to be established by evidence independent of the acts and declarations

of his alleged co-conspirators is in conflict with the comparable decision of this Court rendered in the case of *Bollenbach v. United States*, 326 U. S. 607, 90 L. ed. 318.

5. That each of the matters passed upon in the majority opinion of the Circuit Court of Appeals is an important question of general law and decided in a way not tenable and in conflict with the weight of authority.

Wherefore, and for the reasons herein stated, petitioner respectfully prays that this Honorable Court issue a writ of certiorari to the United States Circuit Court of Appeals for the Ninth Circuit to the end that the questions involved may be fully presented and argued and justice done in the premises.

Dated, San Francisco, California,

March 24, 1947.

Respectfully submitted,

LEO R. FRIEDMAN:

Attorney for Petitioner.

CERTIFICATE OF COUNSEL.

I hereby certify that I am a member of the bar of the Supreme Court of the United States and that I am counsel for the petitioner in the above-entitled cause and that, in my judgment, the foregoing petition is well founded in point of law as well as in fact and that said petition is not interposed for delay.

Dated, San Francisco, California,
March 24, 1947.

LEO R. FRIEDMAN,
Attorney for Petitioner.

In the Supreme Court

OF THE

United States

OCTOBER TERM 1946

No.

ALBERT FEIGENBAUM,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

THE OPINIONS AND JUDGMENTS OF THE COURT BELOW.

The judgment of the trial Court was rendered and filed on May 24, 1945. (R. 53.)

The majority opinion of the Appellate Court was rendered and filed on December 16, 1946. (R. 482.)

The dissenting opinion of Judge Denman was filed on February 28, 1947. (R. 505.)

A petition for rehearing was denied by the Court below on February 28, 1947. (R. 505.)

The judgment of the Appellate Court was entered on December 16, 1946. (R. 504.)

GROUND ON WHICH THE JURISDICTION OF THIS COURT IS INVOKED AND CASES BELIEVED TO SUSTAIN THE JURISDICTION.

The jurisdiction of this Court is invoked under the provisions of Section 240(a) of the Judicial Code. (28 U. S.C.A., sec. 347.)

The ground on which the jurisdiction of this Court is invoked and the cases believed to sustain the jurisdiction are as follows:

1. The majority opinion sanctions the conviction of one charged with conspiracy upon proof that does not establish the single conspiracy charged but establishes several independent and unrelated transactions in which no two of the same defendants were involved, which holding is in direct conflict with the decisions of this Court in the following cases, in each of which this Court exercised its jurisdiction to review the erroneous judgment: *Kotteakos v. United States*, 328 U. S., 90 L. ed. Ad. Op. 1178; *Fiswick v. United States*, U. S., 91 L. ed. Ad. Op. 183.

2. The majority opinion rules that the guilt of one charged with conspiracy can be upheld solely on proof of the acts and declarations of his alleged co-conspirators, which holding is directly contrary to the rulings of this Court in the cases of *Kotteakos v. United States*, *supra* and *Glasser v. United States*, 315 U. S. 60, 86 L. ed. 680, in each of which cases this Court reviewed the question on certiorari.

3. The majority opinion holding that an agreement to violate the Emergency Price Control Act (50 U.S.C.A. App.) can be prosecuted as a felony under

the general conspiracy statute is a misconstruction of the act and this Court has jurisdiction to correct such error by writ of certiorari. *Federal Trade Com. v. Raladam Co.*, 316 U. S. 149, 150, 86 L. ed. 1336, 1339.

4. The majority opinion held that no prejudicial error occurred when the trial Court misdirected the jury on a basic issue by charging the jury that they could determine the existence of a conspiracy and petitioner's connection therewith solely on the evidence establishing acts and declarations of his alleged co-conspirators, and in refusing to give requested instructions to the contrary. In *Bollenbach v. United States*, 326 U. S. 607, 90 L. ed. 318, this Court held that the misdirection of the jury on a basic issue was reversible error and reviewed such a situation on certiorari.

5. Without proof of the single conspiracy charged and petitioner's connection therewith, the majority opinion upheld the action of the trial Court permitting the jury to consider overt acts done by alleged co-conspirators in separate conspiracies of which petitioner was not a member. This holding is directly contrary to the rulings of this Court in the *Kotteakos* case, in which this Court corrected similar error on certiorari.

STATEMENT OF THE CASE.

All of the evidence in the case was produced by the Government. Neither petitioner, nor his co-defendants, offered any evidence.

The indictment in the case (R. 3-6), charged defendants with conspiring to sell Old Mr. Boston Rocking Chair whiskey at a price in excess of and higher than the sum of \$25.27 per case, said latter sum being the maximum wholesale price established by law for the sale of such whiskey.

The evidence established that Goldsmith, doing business as the Francisco Distributing Co., acquired for resale at wholesale 4040 cases of the named whiskey, that of this amount approximately 1575 cases were sold to various tavern operators at various times and in unrelated localities, by three unidentified persons, and that sales were also made by defendants Abel, Blumenthal and petitioner Feigenbaum; no two of the sellers ever acting together, and no purchaser ever having known or dealt with more than one of the defendants. The sales were made at prices ranging from \$55 to \$65 per case and in each instance the seller required the purchaser to make a check, payable to the Distillers' Distributing Company for the amount of whiskey purchased at \$24.50 per case and to pay to the man making the sale the difference in cash. On Goldsmith's company receiving the check the number of cases of whiskey would be sent to the purchaser, together with an invoice for such number of cases, at the price of \$24.50 a case. Goldsmith never received more than \$24.50 per case.

As the trial proceeded each individual purchaser of the whiskey testified as to his dealing with the particular defendant or an unidentified salesman. When such testimony was adduced, counsel for each defend-

ant who was not affected by it objected to the admission thereof on the grounds that the same was hearsay as to him, was *res inter alios acta*, and that the acts and declarations of his alleged co-conspirators were inadmissible as to him until independent proof had been made of the conspiracy charged and his connection therewith. The trial judge then made an order (R. 255) that all testimony offered by the Government would be admitted only against that defendant to whom it related, leaving to the Government the right to move, at the conclusion of its case, to admit all evidence in the case against all defendants.

At the conclusion of the Government's case such motion was made by the prosecutor. (R. 390-391.) Petitioner and his co-defendants objected generally to the granting of the motion and made specific objections to each item thereof on the grounds set forth above. (R. 391-409, Feigenbaum's Assignment of Error XVII, sub-assignments A to W; R. 106-121.) The trial Court granted the Government's motion, with the sole exception of limiting certain testimony given by the witness Harkins to Goldsmith and Weiss. (R. 417.) Exceptions noted. (R. 409.)

The only evidence as to petitioner Feigenbaum was that he operated the Sunset Drug Store, in San Francisco, that he purchased 100 cases of the whiskey for himself at \$24.50 a case, that he agreed to get 100 cases for two men named Taylor and Humes, who operated a tavern in Shasta County, California, that Taylor and Humes had contacted Feigenbaum and he charged them \$64 a case, the payment being made as outlined above.

Petitioner contended that there was no evidence in the case showing that any two of the defendants were acquainted (except possibly Goldsmith and Weiss) or that any one of the defendants knew of the existence of any of the others or that any of the others were engaged in the sales of the whiskey or in the purchase thereof from Francisco Distributing Co. There was no evidence to show that Goldsmith ever received any amount for the whiskey over \$24.50 per case or that he knew that any one was reselling it at more than the ceiling price.

Judge Denman, in his dissenting opinion, emphasizes the lack of evidence in the foregoing particulars and points out that the evidence only established separate and independent conspiracies. (R. 500.)

To demonstrate the correctness of petitioner's contention and Judge Denman's holdings and conclusions we here set forth a complete summary of the testimony of each witness with appropriate references to the record.

SUMMARY OF THE EVIDENCE.

The evidence may be divided into the following subdivisions: (a) the evidence relating to the business and permits of the Francisco Distributing Company; (b) the testimony of Nathanson as to the maximum price for the sale of Old Mr. Boston Rocking Chair Whiskey; and (c) eight separate incidents of isolated transactions involving the sale of whiskey.

1. Testimony relating to the business, etc., of the Francisco Distributing Company.

These preliminary matters were developed on the examination of the Government's witnesses Almon C. Jones (R. 243), Robert Grubbs (R. 250), Fred H. Sander (R. 251) and Frank Ditto (R. 265). In substance this testimony is to the effect that a Wholesaler's Basic Permit had been issued to L. B. Goldsmith, doing business as the Francisco Distributing Company, and thereafter an amended permit was issued to show the withdrawal of one S. S. Weiss from the partnership. Certain documents were produced (U. S. Exhibits 2-6) as having been filed with the Alcohol Tax Unit showing purchases and sales of liquor made by the Francisco Distributing Company for March, 1942, to January, 1944, included therein being two documents entitled "Wholesale Liquor Dealers' Monthly Report, summary of forms 52-A and 52-B". (U. S. Exhibits 2 and 3.) These documents show the purchases of the Francisco Distributing Company during the months of December, 1943 and January, 1944, and disposition of merchandise sold. These latter two exhibits showed the purchase by Francisco Distributing Company of 4040 cases of Old Mr. Boston Rocking Chair Whiskey.

The testimony of these witnesses further showed that two carloads of whiskey had been purchased by the Francisco Company through the Penn Midland Import Company of New Jersey from Ben Burke, Inc. amounting to said 4040 cases. The draft for the payment of the two carloads of whiskey was ordered paid out of the bank account of the Francisco Distributing

Company by Goldsmith. Sander testified that a Mr. Weiss gave him instructions as to the unloading of the two freight cars.

2. Testimony of Nathanson as to the maximum prices for the sale of old Mr. Boston Rocking Chair Whiskey.

The witness Nathanson gave no testimony relating to any of the defendants or their transactions. He testified that he was familiar with M.P.R. 445 published in Federal Register 11161, which established the maximum price per case for the sale by a wholesaler of a case of twelve bottles each containing one-fifth of a gallon of Old Mr. Boston Rocking Chair Whiskey distilled by Ben Burke, Inc. (R. 274-5); that the maximum selling price per case would be \$25.27 from the wholesaler to the retailer f.o.b. San Francisco. (R. 277.)

3. Incident of the sale to Dopey Norman's.

Norman Reinburg testified that he owned a saloon in Vallejo under the name of Dopey Norman's; in December, 1943, and in January, 1944, he purchased some Old Mr. Boston Rocking Chair Whiskey (R. 278); his first talk regarding such purchase was with (appellant) Abel; that Abel wanted to sell him 100 cases of whiskey (R. 279); that he had no previous appointment to meet Abel and such meeting was just accidental (R. 285); that he told Abel he was anxious to get whiskey and that Abel said, "I think I know some place where you might get some"; that Abel said, "Perhaps I can get you some whiskey" (R. 285); that he and Abel finally arrived at a price

of \$65.00 a case; later he gave Abel a check for \$2450 for the first 100 cases of whiskey (R. 279); after he received the bill for the whiskey he gave Abel the rest of the money in cash, totalling \$6500 for 100 cases; he received an invoice from the Francisco Distributing Company; that the check for \$2450 was made payable to the Francisco Distributing Company at Abel's direction (R. 279); that Abel told him he was to pay the balance in cash upon receipt of the bill; that Abel told him the selling price of the 100 cases was \$2450. (R. 280.)

Reinburg further testified to a second purchase of Old Mr. Boston Rocking Chair Whiskey amounting to 100 cases at \$65.00 a case; that the transaction was conducted the same as the first 100 cases (R. 281); that at about the 10th of December he went to the Francisco Distributing Company and attempted to buy some liquor; that the man behind the counter wouldn't give him any business at all; that the man he saw at the Francisco Distributing Company he did not see in the courtroom. (R. 283.) On examination of Reinburg, U. S. Exhibits Nos. 22, 23, 34 and 35 were admitted. These consisted of two bills and invoices, each for 100 cases of whiskey at \$24.50 per case from the Francisco Distributing Company and two checks payable to that company and signed by Reinburg.

John Giometti testified that he operated the Owl Cafe, in Vallejo; that during December, 1943, or January, 1944, he purchased some liquor from the Francisco Distributing Company through Norman Reinburg; that he paid \$65.00 a case for that whiskey.

and purchased 50 cases; that his only conversation about the whiskey was with Norman Reinburg (R. 289) at Reinburg's place of business; that subsequently 50 cases of whiskey were delivered to him in February, 1944; that he gave a check to Reinburg made out to the Francisco Distributing Company; it was a cashier's check for \$1225 and he gave Reinburg the balance of \$65.00 a case in cash of \$2025. (R. 290.)

4. Incident of the first unidentified salesman.

Victor Figoni testified that he owns a saloon in El Cerrito; that in December, 1943, he purchased some Old Mr. Boston Rocking Chair Whiskey from some gentleman in the Francisco Distributing Company; that he bought 200 cases for himself and ordered 75 cases for Mr. Avila; that he had been looking over the courtroom for the last day or two and did not see the man he bought the whiskey from in the courtroom (R. 296); that he took two checks to the Francisco Distributing Company, his own for \$4900 and Avila's check; that each check was payable to the Francisco Distributing Company; that the man he talked to told him to make out a check for \$4900 for 200 cases and to bring the balance in cash to make up \$60.00 a case; that he brought that amount of cash with him and gave the check and cash to the same man. (R. 298.)

Melvin Avila testified that he owned a tavern in El Cerrito; that all of his dealings relating to his purchase of 75 cases of whiskey were with Figoni and he paid \$60.00 a case for the whiskey, which he paid by a check and in cash. (R. 300.)

5. Incident of the second unidentified salesman.

James Cernusco testified that he owned a tavern on Third Street in San Francisco; that in December, 1944, he purchased some Old Mr. Boston Whiskey for himself and two friends of his who owned a saloon in Livermore, named Vukota and Lewis. (R. 301-2.) A man came into his place and gave his name as Weiss or Wise; that he had not and did not see the man in the courtroom, although Cernusco had been in court for two days. The man said he was from the Francisco Distributing Company. (R. 302.) In December he gave this man a check for \$450 drawn by Vukota and payable to Francisco Distributing Company, he also gave the man a check for \$450 and one for \$2000, each drawn by Lewis and payable to Francisco Distributing Company; Cernusco also gave the man \$6100 in cash (R. 304), and a check for \$2000 drawn by Vukota, payable to Francisco Distributing Company (R. 304); the man gave him three invoices of the Francisco Distributing Company, one for Lewis, one for Vukota and one for Cernusco. (R. 306-7.) Cernusco did not know and could not identify appellant Blumenthal. (R. 307.)

John Vukota testified that he owned a tavern in Livermore; that he purchased some Old Mr. Boston Whiskey; that he wrote the two checks, \$450 and \$2000, payable to Francisco Distributing Company, and gave them to Cernusco together with \$3050 in cash, following which he received 100 cases of said whiskey. (R. 308.)

V. M. Lewis testified that he owned a tavern in Livermore; he purchased 100 cases of said whiskey; that he wrote the two checks, \$450 and \$2000, payable to Francisco Distributing Company, and gave them, together with \$3050 in cash, to Cernusco. (R. 309.)

6. Incident of the third unidentified salesman.

Walter Vogel testified that he owned a tavern in San Francisco, that in December he bought some of the named whiskey; that "I don't know the fellow from whom I purchased it" (R. 345); that a man came into his tavern and asked him if he wanted to buy 100 cases of whiskey and he said he did (R. 345); that the man said, "I (Vogel) would have to pay him for the whiskey" (R. 346); the man said the whiskey would be \$24.50 a case, but the man also said, "Now, then, you have to pay me for getting the whiskey for you". He paid \$59.00 a case for the whiskey. The man told him to make a check out to the Francisco Distributing Company for \$2450 and he gave the man the balance in cash, amounting to \$3400. (R. 347.)

7. Incident of the fourth unidentified salesman.

Francis Duffy testified that he owned a tavern in Daly City; that he bought some of the whiskey from a fellow whose name he didn't know; the transaction took place in his tavern; that he had looked around the courtroom and hadn't been able to see the man. The man told him he might be able to get some whiskey. (R. 348.) The man came back and said he had some liquor lined up and that \$24.50 a case is the price; that to make a certainty of getting the liquor

there will be a little premium (R. 350); the man said the premium will be \$20.00 a case and the premium will have to be paid in cash. Duffy gave him a check for \$2000, leaving the name of the payee in blank. (R. 351.) The man did not say the money was going through the Francisco Distributing Company. Later Duffy gave this man a check for \$450 and \$2000 in cash. Duffy never went to the Francisco Distributing Company.

8. Incident of the sale by Blumenthal to Lombardi.

Angelo Lombardi testified that he was a tavern owner in Santa Rosa and that he purchased 100 cases of Old Mr. Boston Whiskey; that he paid cash for the whiskey to a fellow in the Sportorium on Third Street in San Francisco (here witness identifies appellant Blumenthal as the man); that he paid \$3050 in cash to Mr. Blumenthal; that Mr. Minkler was a tavern owner in Santa Rosa and Minkler had contacted the witness; the witness and Minkler went to San Francisco together to the Sportorium; that they did not see Blumenthal on this occasion; Minkler talked to some man there and later told the witness it would be o.k. about the whiskey. (R. 354.) Later the witness and Minkler again went to the Sportorium. On this occasion he saw Blumenthal and paid him the cash; that he had no conversation with Blumenthal; that the witness had written a check for \$2450 payable to Clyde Minkler; that he received an invoice from the Francisco Distributing Company for 100 cases of whiskey and written on the invoice were the words, "Salesman Weiss". (R. 355-6.)

9. Incident of the sale to Fingerhut and Travis.

Herman Fingerhut testified that he owned a tavern in Vallejo and purchased some Old Mr. Boston Whiskey; that he went to the Sportorium and contacted a man there; that he paid \$55.00 a case; that he did not know the man's name but that he looked similar to appellant Blumenthal. On his first visit to the Sportorium he was alone and talked to the man about whiskey. The man said he could probably get him some. The man told him the price was \$55.00 a case for 200 cases; that he would have to pay for it by check representing \$24.50 a case and the balance in cash. (R. 362-3.) The man told him to make out a check which he did for \$2000; this was on his second visit to the Sportorium. (R. 363.) On the second visit to the Sportorium he saw Blumenthal and said he could only take 100 cases but he knew a man named Robert Travis who would take the other hundred cases; that he gave a deposit of \$4000 in cash. (R. 364.) A few days later Travis and the witness went to the Sportorium and the witness said he would take 100 and Travis a hundred. The man told the witness to make out a check for \$2000 to the Francisco Distributing Company, which he did; that he received an invoice from the Francisco Distributing Company for 100 cases; he also delivered the check for \$450 payable to the Francisco Distributing Company; that later he purchased another 25 cases at the same place and from the same man. (R. 365) for \$55.00 a case, together with 75 cases that Travis got; that he gave his money for this latter purchase to Travis. On the second purchase he wrote out a check for \$612 payable

to the Francisco Distributing Company and delivered it to Travis together with cash, making the difference between \$24.50 and \$55.00 a case for 25 cases. (R. 368.)

Walter H. Travis testified that he owned a tavern in Vallejo; that he bought 175 cases of the named whiskey from Mr. Blumenthal in two purchases. First he bought 100 cases for \$5500; that the man in the Sportorium told him to make out a check for \$2000 to the Francisco Distributing Company which he did; that he took the check and the money to Blumenthal; that he paid Blumenthal \$1050 in cash and mailed another check for \$450 payable to the Francisco Distributing Company; that the first cash payment of \$2000 he gave to Fingerhut; that later he purchased an additional 75 cases at \$55.00 from Blumenthal at the Sportorium and 25 cases for Fingerhut. (R. 376.)

10. Incident of the Feigenbaum-Taylor sale.

The testimony as to this incident is the only evidence in the case which directly or indirectly involves the appellant Feigenbaum. The testimony was given by three witnesses Harry L. Taylor, Mrs. Taylor and Raymond C. Humes.

The evidence showed that Feigenbaum conducted a drugstore in San Francisco under the name of the Sunset Drug Store.

Henry L. Taylor testified in substance as follows: Mr. Humes and I operated a bar in Cottonwood, Shasta County (R. 316); Mr. Humes and I made a trip to San Francisco to get some whiskey. I met a man named Little Joe and Tucker in Little Joe's

saloon; I had not known either of them before. I asked if they could get me some whiskey and they said they could; they wouldn't tell where the whiskey was; I told them we would take 100 cases; they said it would cost Mr. Humes and me \$64.00 (R. 323); they asked us for a \$500 deposit which I gave them; I asked if I would get the \$500 back if I did not get the whiskey and they said yes (R. 324); I paid Little Joe and Tucker the \$500 in cash. I came back to San Francisco the 9th of December, as Tucker and Little Joe told us to come back in a week or ten days; I saw Little Joe and Tucker again and they took us to a drugstore on Mission Street which is the first time I met Mr. Feigenbaum; at the drugstore Mr. Humes, Tucker, Little Joe and I went into the drugstore; my wife remained in the car (R. 324); Little Joe introduced us to Feigenbaum and said we were the ones who put up the \$500 for the whiskey and that it was a good thing we got there or we would have lost our deposit; Mr. Feigenbaum said we would get the \$500 back if we didn't get the whiskey; then Feigenbaum instructed us to make out our check and I walked out and brought back my wife; Feigenbaum wanted us to take 200 cases, that he could get us 200 cases; he did not say he had 200 cases he would sell us (R. 325); he asked us for our liquor license as we would have to have those 200 cases recorded under our license; we told him we would take the hundred cases; Feigenbaum instructed Mrs. Taylor to make the check out for \$4900; we said we might take 200 cases if we could handle it, and he said if we did not take the 200 he

would take 100 cases himself. I did not ask why the check should not be made out for \$6400 or for \$5900; we had already paid \$500; the check for \$4900 was made to the Francisco Distributing Company as that was the distributor Feigenbaum was dealing with; Mrs. Taylor made out the check and we left it and \$1050 in cash, of which he already had \$500 (R. 326); I didn't get a receipt for the \$1050; my wife asked for a receipt for the \$4900 check; she did not get one (R. 327); \$50.00 to pay for the shipping of the whiskey was included in the \$1050. I came back to San Francisco on the 23rd; my wife and I were on our way to Los Angeles; I had not received the whiskey; I saw Mr. Feigenbaum in the evening in his drugstore; my wife did not come in; he said the whiskey would be unloaded in a few days; I told him I couldn't take the 200 cases, I could only take 100 cases (R. 327); then Feigenbaum wrote out a check to me and told me to sign it; he wanted me to sign the check so that he could have it back again; he didn't tell me why; that was for the other hundred cases that we made the deposit on; the check for \$4900 which I gave was the deposit on the 200 cases at first if we could take them; it was a deposit on an order from the Francisco Distributing Company for 200 cases of whiskey. On my last visit to the drugstore Feigenbaum told me he was going to take the other 100 cases and I said I was not going to take them; he wanted his records to show that I put up a deposit for half of that; it was to clear his records; I signed the check he wrote out. (R. 328.) He then showed me a bottle of whiskey and I bought a

case from him at the time for \$64.00 in cash. I did not meet Feigenbaum again. I eventually got my 100 cases of whiskey. (R. 329.) At first we agreed to take 200 cases of whiskey; it was on the 23rd that I changed that original agreement.

Ruth Taylor, the wife of Henry Taylor, testified in substance as follows: The check to the Francisco Distributing Company for \$4900 is my check and my signature appears thereon; I wrote that check in the Sunset Drugstore on December 9, 1943; my husband, Mr. Humes and Mr. Feigenbaum and a man named Tucker and one they named Little Joe was present; I wrote that check on Mr. Feigenbaum's instructions; he told me the amount and to whom I should make it payable; I did not witness the payment in cash of any money to Mr. Feigenbaum (R. 330); I asked if we would get a receipt for the check and Feigenbaum said the check would answer as a receipt. I had no other discussion and didn't hear any of the transactions; I left after I wrote the check. (R. 331.)

Raymond C. Humes testified (R. 332-342) in substance the same as Henry L. Taylor with the following amplifications: Feigenbaum asked us fifty cents a case to pay for the freight; Feigenbaum said he wanted a check for \$24.50; he said that was going to the distributor and that we would have to come through with a \$1050 in cash (R. 335); on December 9 Mr. Taylor and I agreed to take 200 cases. Later we got to talking it over and thought we could only handle 100 cases; we wrote the check in anticipation of taking 200 cases; I never met Feigenbaum before and saw him only

on that one occasion. (R. 237.) It is a fact that the check for \$4900 was to be made out because that was the money the distributing company was to get for the whiskey; Feigenbaum said the balance would have to be paid in cash to him; Feigenbaum told us we would have to make a check for \$4900 for 200 cases "which was what the distributing company was going to get, and the balance of the cash was what he was going to get". (R. 341.) We gave altogether the check for \$4900, and \$1000, plus \$500 I had given to Mr. Tucker, all of which made \$6400 and \$50 for freight. We were told that we would have to make out the check for the number of cases at \$24.50 a case. (R. 342.)

At the conclusion of the evidence in the case petitioner moved the trial Court for a directed verdict of not guilty. (R. 421-2.) Motion denied and exception noted. (R. 422.)

Petitioner submitted three requested instructions (R. 133, 134, 135) to the effect that as to Feigenbaum the conspiracy charged and his connection therewith could not be established by the acts and declarations of his alleged co-conspirators, but had to be established by independent evidence. The trial Court not only refused to give such requested instructions but, in effect, instructed the jury to the contrary (R. 443), to all of which exceptions were duly noted. (R. 449.)

The Circuit Court of Appeals, Judge Denman dissenting, affirmed the conviction and judgment.

SPECIFICATIONS OF ERRORS RELIED ON.

1. The majority opinion of the lower Court is in error in holding that where an indictment charges five defendants with a single conspiracy, such single conspiracy is established by evidence which only established several separate and distinct conspiracies in each of which no more than two of the codefendants participated.

2. The majority opinion of the lower Court is in error in holding that, where five persons are charged with a conspiracy, the conviction of one can be upheld where the only proof of the conspiracy and such person's connection therewith consists of the acts and declarations of his alleged co-conspirators, done and said out of his presence.

3. The majority opinion of the lower Court is in error in holding that essential and ultimate facts, necessary to establish a charge of conspiracy, can be established by inference based upon other inferences.

4. The majority opinion of the lower Court is in error in failing to pass upon, and therefore inferentially approving, the refusal of the trial Court to give requested instructions to a jury on a basic issue involved in a trial for conspiracy, such requested instructions being in substance that, in determining the existence of the conspiracy charged and a defendant's connection therewith, the acts and declarations of alleged co-conspirators cannot be considered.

5. The majority opinion of the lower Court is in error in holding two or more persons may be prose-

cuted for a felony conspiracy under the general conspiracy statute, in conspiring to sell whiskey at a price in excess of the maximum selling price established under the Emergency Price Control Act, where the latter Act makes an agreement so to do a substantive offense punishable as a misdemeanor.

ARGUMENT.

1. THE EVIDENCE WAS INSUFFICIENT TO ESTABLISH THE SINGLE CONSPIRACY CHARGED IN THE INDICTMENT.

Assuming, merely for this phase of the argument, that all of the evidence was properly admitted against Feigenbaum, such evidence failed to establish the single conspiracy charged and did no more than, if believed, establish seven separate and distinct conspiracies, in no one of which was any more than two of the defendants involved, and in no more than one of which was either Abel, Blumenthal, or Feigenbaum involved.

The evidence, a complete summary of which is set forth above, established that seven different people made or negotiated sales of 1575 cases of the whiskey. In each case the Francisco Distributing Co. (Goldsmith) received checks for only \$24.50 a case, the surplus paid in cash being received and retained by the person making the sale.

The evidence failed to establish many essential factors, which are correctly stated in the dissenting opinion of Judge Denman in dealing with the evi-

dence as to Feigenbaum, Abel and Blumenthal, as follows:

"The court's opinion is bare of facts, as is the evidence,

"(1) That any of these three knew or was in any communication with any others of them;

"(2) That any knew that any other obtained whiskey from the defendants Goldsmith and Weiss;

"(3) That any of the three sellers knew that any other of them bought the whiskey from the so-called 'common pool' of whiskey in the warehouse—a common pool only in the sense that each separately obtained his whiskey from it, but not a pool of which any of the three had common knowledge that any other of them had obtained his whiskey from it;

"(4) That any knew that any other bought his whiskey at the same below-ceiling price;

"(5) That any knew that any other sold his whiskey at the same or similar over-ceiling prices." (R. 500.)

and in dealing with Goldsmith and Weiss said:

"The court's opinion states no facts and the record has none showing that either Weiss or Goldsmith knew that any whiskey was sold at such higher prices, much less than there was any agreement with the three (Abel, Blumenthal and Feigenbaum) or any one of them for such prohibited sales." (R. 503.)

The case is thus brought squarely within the facts and the law as recently announced by this Court.

In *Kotteakos v. United States*, 328 U. S., 90 L. ed. Ad. Op. 1178, this Court reversed convictions on a record similar to the one in the case at bar and explained and modified the holding in the case of *Berger v. United States*, 295 U. S. 78.

In the *Kotteakos* case the indictment charged a general conspiracy in which a number of people operating through a common key figure, Simon Brown, were to make applications to various financial institutions for credit with the intent that the loans or advances would then be offered to the FHA for insurance upon applications containing false and fraudulent information. Seven of the defendants charged were found guilty. The evidence established that several applications for such loans had been made through the key figure Brown, but as this Court states "no connection was shown between them and petitioners, other than that Brown had been the instrument in each instance for obtaining the loans. In many cases the other defendants did not have any relationship with one another, other than Brown's connection with each transaction".

(Note the similarity between the facts in the *Kotteakos* case and the case at bar. While Feigenbaum and the other defendants were all conducting the same kind of transaction, no connection was shown between them other than that Goldsmith was the central distributing point from which the whiskey was procured.)

Following the foregoing language this Court says:

"The proof therefore admittedly made out a case, not of a single conspiracy, but of several,

notwithstanding only one was charged in the indictment. Cf. *United States v. Falcone*, 311 U. S. 205, 85 L.ed. 128, 61 S.Ct. 204; *United States v. Peoni* (CCA 2d), 100 F.2d 401; *Tinsley v. United States* (CCA 8th), 43 F.2d 890, 892, 893. The Court of Appeals aptly drew analogy in the comment, 'Thieves who dispose of their loot to a single receiver—a single "fence"—do not by that fact alone become confederates; they may, but it takes more than knowledge that he is a "fence" to make them such.' "

(Again note how applicable to the present case is the foregoing language. The mere fact that the liquor was procured from a single dispenser does not make all the persons procuring such liquor confederates.)

In discussing the ruling announced in *Berger v. United States*, *supra*, the Supreme Court put the question as follows:

"The question we have to determine is whether the same ruling may be extended to a situation in which one conspiracy only is charged and at least eight having separate, though similar objects, are made out by the evidence, if believed; and in which the more numerous participants in the different schemes were, on the whole, except for one, different persons who did not know or have anything to do with one another."

and held that under such circumstances the doctrine of the *Berger* case was inapplicable and at page 1189 states:

"The jury could not possibly have found, upon the evidence, that there was only one conspiracy. The trial court was of the view that one con-

spiracy was made out by showing that each defendant was linked to Brown in one or more transactions, and that it was possible on the evidence for the jury to conclude that all were in a common adventure because of this fact and the similarity of purpose presented in the various applications for loans.

"This view, specifically embodied throughout the instructions, obviously confuses the common purpose of a single enterprise with the several, though similar, purposes of numerous separate adventures of like character."

On the same page the Court points out the evil resulting from such circumstance in that the Court there, as did the Court here (R. 440-441), instructed the jury that any overt act done by one defendant would be sufficient to complete the proof of the crime as against all.

On page 1191 the entire matter is summed up by the Supreme Court as follows:

"Here the toleration went too far. We do not think that either Congress, when it enacted § 269, or this Court, when deciding the Berger Case, intended to authorize the Government to string together, for common trial, eight or more separate and distinct crimes, conspiracies related in kind though they might be, when the only nexus among them lies in the fact that one man participated in all."

and that prejudicial error occurred is announced on page 1192:

"With all deference we disagree with that conclusion and with the rule that the permeating

error did not affect 'the substantial rights of the parties.' That right, in each instance, was the right not to be tried *en masse* for the conglomeration of distinct and separate offenses committed by others as shown by this record."

In the instant case we have the identical situation presented in the *Kotteakos* case. Four sales were conducted by mysterious salesmen and independent sales made by Abel, Blumenthal and Feigenbaum. Thus, we find at least seven separate and distinct transactions participated in by separate and distinct parties, the only "nexus among them" being "in the fact that one man (Goldsmith) participated in all".

The reasons stated in the majority opinion as being sufficient to justify the verdict of the jury consist merely of inference piled upon inference and **each matter stated as a material ultimate fact is but an inference based upon another inference.**

It is the fundamental and invariable rule of evidence that where a case depends upon circumstantial evidence, inference cannot be based upon inference nor presumption upon presumption. An inference must be based upon a fact established by direct evidence and such fact, as the predicate for an inference, cannot be either inferred or presumed. In this regard see the following cases:

- U. S. v. Ross*, 2 Otto, 281, 23 L. ed. 707, 708;
- Vernon v. United States*, 146 Fed. 121, 126;
- Brady v. United States*, 24 Fed. (2d) 399, 403.

The matters which the majority opinion states as ultimate facts which the jury was justified in finding

contain many statements violative of the foregoing rule.

The majority opinion states that when the sale was made by Feigenbaum "the facilities of Francisco were thereupon used * * * for the purpose of clearing their sales through the books of Francisco with the knowledge and cooperation of Goldsmith and Weiss." (R. 486.) Manifestly this is a statement to the effect that Goldsmith and Weiss knew that Feigenbaum, Abel and Blumenthal were selling at prices exceeding the ceiling price and that the books of Francisco were used for such purpose. There is no evidence in the record to this effect and the same constitutes but a mere conjecture.

The opinion goes on to state that Feigenbaum, together with Abel and Blumenthal shared in a common access to the stock or pool of whiskey. (R. 487.) That Feigenbaum made one purchase for himself and one sale to the Taylors of the whiskey involved is all that appears in the record. The evidence does not establish that he knew that either Abel or Blumenthal could either purchase or sell from this stock of whiskey. Nor is there any evidence to establish that Feigenbaum could have either purchased for himself or others any more than the two hundred cases involved in his individual transaction. The statement that these three individual defendants shared in a common access to the stock of whiskey is but an inference drawn by the Court. The opinion states that when the checks to Francisco were cleared through its books "and the side money payments collected by

Abel, Blumenthal and Feigenbaum, the whiskey was delivered by Francisco to these purchasers." (R. 488.) While this is a statement of the chronological occurrence of the facts, it contains the inference that Francisco only delivered the whiskey when Goldsmith or Weiss knew that Feigenbaum, Abel or Blumenthal had collected over-ceiling prices. There is no evidence in the record to justify such an inference.

The opinion further states that if the jury was convinced of the events established by direct evidence "then the jury was justified in inferring that appellants were parties to a single agreement and conspiracy to commit the offenses charged." (R. 489.) In order to arrive at the conclusion that "appellants were parties to a single agreement and conspiracy" it is necessary to indulge in a series of inferences. Thus, it would have to be inferred either that Feigenbaum was acquainted with Abel and Blumenthal and with either Goldsmith or Weiss. There is no evidence to this effect in the record. Next, the inference would have to be drawn that being so acquainted Feigenbaum agreed, expressly or tacitly, with Abel, Blumenthal, Goldsmith or Weiss that the whiskey was to be sold to retailers above the ceiling price, or that Feigenbaum had knowledge that Abel and/or Blumenthal on the one hand and Goldsmith and/or Weiss on the other hand had entered into an understanding whereby the first parties were to sell the whiskey above the ceiling price and that the parties representing Francisco were to further such sales by shipping the goods and issuing invoices at the ceiling

price. There is no evidence in the record to justify this inference. Further, the inference has to be drawn that Goldsmith and/or Weiss knew that Feigenbaum was selling the whiskey above the ceiling price and that they filled the order to the Taylors with knowledge of this fact and for the purpose of furthering the unlawful activity of Feigenbaum. There is no evidence in the record in this regard. The mere proof that Francisco was issuing invoices at \$24.50 a case and received but \$24.50 a case will not justify an inference that the Francisco people knew that someone else was selling this whiskey above the ceiling price. The fact that Feigenbaum, Abel and Blumenthal each sold whiskey above the ceiling price will not justify the inference that one knew the other was so doing.

As to petitioner Feigenbaum the prejudicial effect of the manner in which the cause was presented to the jury is identical with the situation in the *Kottekos* case.

Thus, the Court charged the jury that they could find the defendants guilty if they were satisfied beyond a reasonable doubt that a conspiracy as charged in the indictment was entered into between two or more of the defendants and that in addition to such conspiracy—between two or more defendants—one or more of the overt acts described in the indictment was done by one or more of the defendants to effect the object of the conspiracy. (R. 440-441.) Then the Court charged the jury, "If persons pursue by their acts the same unlawful object, one performing one act and

a second another act, all with a view to the attainment of the object they are pursuing, the conclusion is warranted that they are engaged in a conspiracy to effect that object." (R. 441-442.) In charging about the overt acts the trial Court said, "if during the existence of the conspiracy the overt act is done by one of the conspirators to effect the object of the conspiracy, the crime is complete, and it is complete as to every party found by you to be a member of the conspiracy no matter which one of the parties did the overt act." (R. 444.)

Under the foregoing charge the jury was instructed that if they found that the several defendants were each indulging in acts that resulted in selling whiskey above the ceiling price and that they had the same purpose in mind, they would be justified in finding that they were conspiring together for such unlawful purpose and that proof of any one overt act, out of the ten charged in the indictment, would be sufficient upon which to predicate a verdict of guilty. There was withdrawn from the jury, under these instructions, the power of the jury to determine whether the acts committed by each defendant constituted but a separate and isolated transaction or a separate conspiracy involving the Francisco people and such defendant, all as distinguished from a general conspiracy in which all defendants participated. The finding of the jury that the single conspiracy existed may find justification under the instructions as given by the Court, but is without support in the evidence and directly contrary thereto. As this Court said in the *Kotteakos* case:

"On those instructions it was competent not only for the jury to find that all of the defendants were parties to a single common plan, design and scheme, where none was shown by the proof, but also for them to impute to each defendant the acts and statements of the others without reference to whether they related to one of the schemes proven or another, and to find an overt act affecting all in conduct which admittedly could only have affected some."

2. THE LOWER COURT, IN ORDER TO ESTABLISH THE CONSPIRACY CHARGED, HAS RESORTED TO THE ACTS AND DECLARATIONS OF FEIGENBAUM'S CO-CONSPIRATORS, SUCH EVIDENCE BEING INCOMPETENT FOR SUCH PURPOSE.

It is the law that the existence of a conspiracy cannot be established against an alleged conspirator by evidence of the acts or declarations of an alleged co-conspirator done or made in his absence. It is also the law that in determining the sufficiency of the evidence to establish a conspiracy the acts and declarations of an alleged co-conspirator cannot be considered for any purpose.

In the instant case evidence as to the acts and declarations of Abel, Blumenthal and the several unidentified salesmen, when offered as evidence against Feigenbaum, was strenuously objected to on the ground that such evidence was not admissible against him until there had been independent proof of the conspiracy charged and Feigenbaum's connection therewith and that there was no such independent

evidence. (R. 393 to 409.) The trial judge overruled these objections and admitted all such evidence against Feigenbaum. In determining the sufficiency of the evidence the majority opinion considers such incompetent testimony for the purpose of establishing the conspiracy and Feigenbaum's connection therewith and had to do so in order to uphold the judgment as there was no other evidence in the case.

Omitting the evidence of the sales made by Abel and Blumenthal and the four unidentified salesmen, the only evidence pertaining to Feigenbaum is that he made one sale of 100 cases of whiskey to Taylor and Humes, paying to the Distributing Co. \$24.50 per case therefor although he charged Taylor and Humes \$64 per case. This evidence is wholly insufficient to establish the conspiracy charged.

The rules contended for by petitioner have been firmly established by this Court in the *Kotteakos* case, supra, a pertinent portion of which decision we have above quoted to the effect that the overt acts of alleged co-conspirators are incompetent and cannot be used to establish the conspiracy against a particular defendant. Such is also the rule announced in the following cases:

"The existence of the conspiracy cannot be established against an alleged conspirator by evidence of the acts or declarations of his alleged co-conspirators done or made in his absence."

Minner v. United States, 57 Fed. (2d) 506, 511.

"The existence of the conspiracy charged cannot be established against an alleged conspirator

by evidence of the acts or declarations of his alleged co-conspirator done or made in his absence. *Hauger v. United States* (C.C.A. 4) 173 F. 54, 57. *United States v. Richards* (D. C. Nev.) 149 F. 443; *United States v. Goldberg*, supra; *United States v. McKee*, supra.

"Therefore the statements made and acts done by Gorges in the absence of appellants should not be considered in determining whether the evidence established the connection of appellants with such conspiracy."

Thomas v. United States (CCA-10), 57 Fed. (2d) 1039, 1042.

In *Glasser v. United States*, 315 U. S. 60, 86 L. ed. 680, four persons were indicted for conspiracy to defraud the United States. During the trial witnesses testified to statements made by the defendant Kretske during the course of the alleged conspiracy which implicated Glasser. Glasser claimed that such testimony could not be considered as evidence against him in determining whether a conspiracy existed and that he was a party thereto. The Supreme Court upheld this contention and reversed the case as to Glasser stating, at page 74 of the reported case, as follows:

"Glasser contends that such statements constituted inadmissible hearsay as to him * * *. The Government attacks this argument as unsound, and, relying on the doctrine that the declarations of one conspirator in furtherance of the object of the conspiracy made to a third party are admissible against his co-conspirators, *Logan v. United States*, 144 U.S. 263, 36 L. ed. 429, 12 S Ct

617, contends that the declarations of Kretske were admissible against Glasser and hence no prejudice could arise from Stewart's failure to object. **However, such declarations are admissible over the objections of an alleged co-conspirator, who was not present when they were made, only if there is proof aliunde that he is connected with the conspiracy.** *Minner v. United States* (CCA 10th) 57 F. (2d) 506; and see *Nudd v. Burrows*, 91 US 426, 23 L ed 286. **Otherwise hearsay would lift itself by its own boot straps to the level of competent evidence."**

The foregoing rule has been recognized and applied in the Ninth Circuit in the following cases:

Dolan v. United States (CCA-9), 123 Fed. 52, 54;

Kuhn v. United States (CCA-9), 26 Fed. (2d) 463;

Sugarman v. United States (CCA-9), 35 Fed. (2d) 663.

As the evidence of the seven incidents relating to sales, in which the defendant Feigenbaum was not involved, cannot be considered in determining whether the evidence established the conspiracy charged and Feigenbaum's connection therewith, we are left with no other evidence in the case except the isolated sale by Feigenbaum to Taylor and Humes. Therefore, there is no competent evidence in the record to establish either the conspiracy charged or Feigenbaum's connection therewith.

3. **THE REFUSAL TO GIVE FEIGENBAUM'S REQUESTED INSTRUCTIONS 27, 28 AND 29 CONSTITUTES REVERSIBLE ERROR AS BEING A MISDIRECTION OF THE JURY ON A BASIC ISSUE.**

There was no more important phase of the trial than the charge of the Court to the jury. In order that the correct rules of law be given to the jury Feigenbaum submitted three requested instructions numbered 27, 28, and 29 (R. 458-9), reading as follows:

"In order for you to find the defendant Albert Feigenbaum guilty of the crime of conspiracy as charged in the indictment it is necessary that you find, among other things, to a moral certainty and beyond a reasonable doubt that a conspiracy existed between at least two persons to do the things set forth in the indictment and that Albert Feigenbaum was a member of such conspiracy. In determining whether such conspiracy existed and that Feigenbaum was a member of such conspiracy you cannot take into consideration and must disregard all testimony and evidence relating to the acts and declarations of any alleged conspirator, other than the defendant Feigenbaum, said or done out of the presence of the defendant Feigenbaum. The existence of the conspiracy charged and Feigenbaum's connection therewith must be established by evidence independently of the acts and declarations of any alleged co-conspirator of Feigenbaum's said or done out of the presence of the defendant Feigenbaum." (R. 458.)

"In determining whether a conspiracy existed, as charged in the indictment, and that the defendant Feigenbaum was a member of such conspiracy,

I instruct you that you cannot consider testimony of the acts or declarations of any other person, charged in the indictment with being a co-conspirator with Feigenbaum, where such acts or declarations were done or made out of the presence of defendant Feigenbaum." (R. 458.)

"In determining whether the conspiracy charged in the indictment existed and that Albert Feigenbaum was a member of such conspiracy you must reject and disregard all evidence and testimony in the case relating to anything said or done, out of the presence of defendant Feigenbaum, by the defendants Goldsmith, Blumenthal, Weiss and Abel." (R. 459.)

The Court refused to give the foregoing instructions to which refusal Feigenbaum duly excepted.

We have heretofore argued the incompetency of evidence dealing with acts and declarations of Feigenbaum's alleged co-conspirators and that such evidence could not be considered to establish the conspiracy charged or Feigenbaum's connection therewith. We will not repeat that argument here.

The existence of the conspiracy as charged, and Feigenbaum's connection therewith were basic issues in the case and the refusal of the Court to charge the jury as requested and in effect charging the jury directly contrary thereto was prejudicial error necessitating a reversal of the judgment.

The majority opinion does not directly pass upon this matter but approves as a whole the charge given by the trial Court to the jury and concludes on this

point by stating, "From our examination we are satisfied that the instructions, taken as a whole, correctly presented the law to the jury." (R. 498.)

Repeatedly throughout the majority opinion are statements to the effect that the evidence was sufficient to establish petitioner's guilt beyond a reasonable doubt and apparently the conclusion is drawn that as the evidence was sufficient to establish petitioner's guilt any error in the procedure by which that guilt was established became insignificant and non-prejudicial.

To demonstrate that the reasoning in the majority opinion is erroneous we need but look at the recent decision of this Court in *Bollenbach v. United States*, 326 U. S. 607, 90 L. ed. 318, where in dealing with the duty to properly charge the jury, this Court said:

"Discharge of the jury's responsibility for drawing appropriate conclusions from the testimony depended on discharge of the judge's responsibility to give the jury the required guidance by a lucid statement of the relevant legal criteria."

and later states:

"A conviction ought not to rest on an equivocal direction to the jury on a basic issue."

The question was raised that the error was not prejudicial as there was abundant evidence of guilt. This court disposed of this contention as follows:

"In view of the Government's insistence that there is abundant evidence to indicate that Bollenbach was implicated in the criminal enterprise

from the beginning, it may not be amiss to remind that the question is not whether guilt may be spelt out of a record, but whether guilt has been found by a jury according to the procedure and standards appropriate for criminal trials in the federal Courts."

Lastly, it was held that a misdirection on a vital issue was not one of those "technical errors" which "do not affect the substantial rights of the parties" and concluded its opinion as follows:

"In view of the place of importance that trial by jury has in our Bill of Rights, it is not to be supposed that Congress intended to substitute the belief of appellate judges in the guilt of an accused, however justifiably engendered by the dead record, for ascertainment of guilt by a jury under appropriate judicial guidance, however cumbersome that process may be."

4. THE MAJORITY OPINION IS IN ERROR IN HOLDING THAT THE OFFENSE COULD BE LAID UNDER THE GENERAL CONSPIRACY STATUTE OF THE UNITED STATES.

The Emergency Price Control Act (50 U.S.C.A. App.) makes it a substantive offense (a misdemeanor) to agree to violate any regulation of the administrator. There cannot be a conspiracy to conspire. As the acts alleged in the indictment constitute a violation of the Emergency Price Control Act they cannot constitute a violation of section 88 of Title 18, U.S.C.A.

Section 4 (a) of the Emergency Price Control Act reads as follows:

"Sec. 4. (a) It shall be unlawful, regardless of any contract, agreement, lease, or other obligation hertofore or hereafter entered into, for any person to sell or deliver any commodity, or in the course of trade or business to buy or receive any commodity, or to demand or receive any rent for any defense-area housing accommodations, or otherwise to do or omit to do any act, in violation of any regulation or order under §2, or of any price schedule effective in accordance with the provisions of §206, or of any regulation, order, or requirement under § 202 (b) or § 205 (f); or to offer, solicit, attempt, or agree to do any of the foregoing."

Section 205(b) denounces as a misdemeanor any violation of the foregoing section.

In the criminal law "conspiracy" and "agreement" are synonymous. To conspire is to agree. (*Morrison v. California*, 291 U. S. 82, 54 S. Ct. 281, 78 L. ed. 664; *Marcenty v. U. S.*, 49 Fed. (2d) 156; *Wright v. United States*, 108 Fed. 805.)

The Emergency Price Control Act denounces as a substantive offense a conspiracy to violate a regulation of the Administrator. Where two persons are necessary to the commission of a substantive offense the same two cannot be guilty of conspiring to commit such substantive offense. As it requires two parties to commit the substantive offense denounced by the Emergency Price Control Act these same people cannot be guilty of conspiring to commit such offense. In support of the rule, we call attention to the following cases:

United States v. Sager, 49 Fed. (2d) 725;
Norris v. United States, 34 Fed. (2d) 839;
U. S. v. Katz, 271 U. S. 354, 7 L. ed. 986;
Gebardi v. United States, 287 U. S. at 119, 7 L. ed. 209.

The majority opinion attempts to avoid the foregoing conclusion by alleging that the general conspiracy statute "includes as a necessary element the commission of an overt act. There is no mention of the overt act in pursuance of the agreement alluded to in the Emergency Price Control Act." (R. 485.) And concludes that such is "a clear and striking distinction" between the misdemeanor and felony agreements.

It is apparent that the entire scheme embodied in the Emergency Price Control Act was to punish merely as misdemeanors persons who in any manner sought to sell commodities above the established maximum price and this irrespective of whether it was done as the act of one individual or as the act of two or more individuals.

The purpose of the act was to regulate the price of commodities rather than the conduct of the person dealing in commodities. To put a greater punishment upon two people who sell one article above the maximum price would seem a plain distortion of the statute. To illustrate: A is the sole operator of a store and sells an article above the maximum price. He can be punished only for committing a misdemeanor. On the other hand B and C are partners running the

same kind of a store and selling the same article; if they sell above the ceiling price they can be prosecuted for a felony on the ground that they agreed so to do and in actually selling committed an overt act. This plainly was not the intention of the Congress.

The reasoning adopted in the majority opinion places the higher punishment not on the agreement to do the act but on an overt act done pursuant to the agreement, which overt act may in itself be entirely innocent. In all conspiracies the gist and substance thereof is the unlawful agreement. (See, *Pinkerton v. United States*, U. S., 90 L. ed. Ad. Op. 1212, 1215.) In the latter case, at page 1214, this Court states that the only act that need be done in furtherance of a general criminal conspiracy is the completed crime itself. Applying this to the Emergency Price Control Act the only thing following an agreement to sell need be the sale. Every sale includes an agreement to sell because every sale is a contract. The Congress clearly intended to withdraw from the general conspiracy statute, sales and agreements to sell, and the conclusion reached in the majority opinion is erroneous.

CONCLUSION.

The foregoing we believe demonstrates that petitioner was tried and convicted in a manner not consistent with the rules and procedure applicable to the trial of causes in our Federal Courts; that the majority opinion has decided important issues of law in manner contrary to the decisions of this Court and that the writ should issue as prayed for.

Dated, San Francisco, California,
March 24, 1947.

Respectfully submitted,

LEO R. FRIEDMAN,

Attorney for Petitioner.

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Nos. 1162, 1163, 1164, and 1165

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In the Supreme Court of the United States

OCTOBER TERM, 1946

HARRY BLUMENTHAL, PETITIONER

v.

UNITED STATES OF AMERICA

LAWRENCE B. GOLDSMITH, PETITIONER

v.

UNITED STATES OF AMERICA

SAMUEL S. WEISS, PETITIONER

v.

UNITED STATES OF AMERICA

ALBERT FREIDENBAUM, PETITIONER

v.

UNITED STATES OF AMERICA

**ON PETITIONS FOR WRITS OF HABEAS CORPUS TO THE UNITED
STATES CIRCUIT COURT OF APPEALS FOR THE NINTH
CIRCUIT**

BRIEF FOR THE UNITED STATES IN OPPOSITION

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In the Supreme Court of the United States

OCTOBER TERM, 1946

No. 1162

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SAMUEL S. WEISS, PETITIONER

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UNITED STATES OF AMERICA

No. 1165

ALBERT FEIGENBAUM, PETITIONER

v.

UNITED STATES OF AMERICA

**ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED
STATES CIRCUIT COURT OF APPEALS FOR THE NINTH
CIRCUIT**

BRIEF FOR THE UNITED STATES IN OPPOSITION**OPINIONS BELOW**

The original opinion of the Circuit Court of Appeals (R. 482-498) is reported at 158 F. (2d) 883. The denial of the petitions for rehearing and the dissenting opinion of Judge Denman have not yet been reported. Judge Denman's dissenting opinion may be found at page 499 of the record.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered December 16, 1946 (R. 505). The petitions for rehearing were denied February 28, 1947 (R. 505). The petitions for writs of certiorari were filed March 26, 1947. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925. See Rules 37 (b) (2) and 45 (a) of the Federal Rules of Criminal Procedure.

QUESTIONS PRESENTED

1. Whether there was evidence of a single conspiracy to sell whiskey at over-ceiling prices.
2. Whether the trial court erred in admitting the acts and declarations of each of the alleged conspirators against all of them.
3. Whether the trial court erred in admitting certain extra-judicial admissions made by petitioners Goldsmith and Weiss.

4. Whether a conspiracy to violate the Emergency Price Control Act may be prosecuted under Section 37 of the Criminal Code (18 U. S. C. 88).

STATUTES INVOLVED

The pertinent sections of the Emergency Price Control Act and the provisions of Section 37 of the Criminal Code are set forth in the Appendix, *infra*, pp. 14-17.

STATEMENT

Petitioners, together with one Abel, were tried below on an indictment charging conspiracy to violate the Emergency Price Control Act by selling whiskey at over-ceiling prices (R. 3). All pleaded not guilty (R. 11, 21). Petitioner Blumenthal moved to quash the indictment on numerous grounds, including the contention that it was not a violation of Section 37 of the Criminal Code to conspire to violate the Emergency Price Control Act (R. 16-19). The motion was denied (R. 21).

The evidence introduced by the government against petitioners may be summarized as follows:

Petitioners Goldsmith and Weiss were partners operating the San Francisco Distributing Co. (hereinafter called Francisco). The necessary wholesaler's basic permit had been issued to Goldsmith (R. 244). None of the other alleged conspirators had been issued a basic permit (R. 246). During December 1943 two cars of Old Mr.

Boston Rocking Chair Whiskey were received by Francisco and the cases of whiskey contained therein were stored, released, and delivered by the San Francisco Warehouse Company in accordance with the orders of Weiss (R. 251-254). At the time Weiss first arranged for delivery by the Warehouse Company, he turned over to it some of the invoices for sales already made to the tavern keepers described below. Goldsmith arranged for the payment of the sight drafts for the whiskey from Francisco's bank. (R. 267-268.)

The whiskey was disposed of by a uniform procedure. Government witnesses testified to transactions with Abel, Feigenbaum, Blumenthal, an unidentified person at the offices of Francisco, and unidentified salesmen. Some of the key transactions, including that by Feigenbaum and one of those by Blumenthal, occurred prior to Francisco's receipt of the carloads of whiskey (R. 323, 362). All the sales followed a consistent pattern:¹ A tavern owner was informed by a visitor to his shop or by a person to whom he had complained of his need for whiskey that he could have some. He was instructed by the negotiator to make out a check to Francisco, the price always being calculated at \$24.50 per case, which was below the ceiling price of \$25.27 (R. 438). (Sales

¹ This repeated picture was developed in the testimony of Norman Reinburg, Giometti, Figone, Cernusco, Mr. and Mrs. Taylor, Humes, Vogel, Duffy, Lombardi, Fingerhut, and Travis (R. 278-380).

were generally made in units of 100 to 200 cases.) An additional cash payment was required by and delivered to the negotiator, but the record offers no light on the money's ultimate disposition. This side payment brought the total price to \$55 to \$65 a case. Sometime later the whiskey was delivered. Either before or at delivery, Francisco's invoice for the whiskey at \$24.50 a case was given to the purchaser. The check cleared through Francisco's bank account and Francisco, for its participation, received \$2 a case, shared by Weiss and Goldsmith equally (R. 381).

The testimony of the tavern keepers brought out other salient facts. A good deal of the evidence revolved around the Sportorium, a sporting goods store in the vicinity of Market and Third Streets in San Francisco. The transactions in which Blumenthal participated took place there and the shop was apparently Blumenthal's headquarters (R. 354, 359, 362, 373). Abel asked to be dropped and picked up at that shop when he was brought to the city by one of the buyers (R. 282), as did one of the unidentified salesmen (who said he was from Francisco) (R. 302). Abel was also seen entering the shop (R. 283).

At the other focal point of the conspiracy, Francisco's place of business, an unidentified person participated in a sale which did not deviate from the pattern outlined above (R. 296-299). Moreover, an unidentified salesman in

another one of the transactions had in his possession and delivered to the buyer the warehouse release slip from the warehouse in which the whiskey was stored (R. 351-352). Two of the buyers testified that the person approaching them about the liquor had called himself Weiss and Weiss's name appeared as a notation on invoices delivered (R. 295, 299, 302). The Feigenbaum transaction, similar to the others, took place at his drug store (R. 316-342).

It appeared further that the use of the facilities of Francisco, a licensed wholesaler, was indispensable to the conspiracy, as the tavern keepers would buy only when they were furnished with invoices for their records (R. 285, 292).

In addition to the buyers, who testified to the above facts, Harkins, a special investigator for the Alcohol Tax Unit, told of conversations he had had with petitioners Goldsmith and Weiss, in which they both admitted that they received \$2 a case for their share in the repeated sales of the whiskey, and Goldsmith admitted that he had made out some of the invoices in the transactions involved. They also intimated to Harkins that they had never owned the liquor (R. 380-390).

The evidence of each transaction was initially received only against the defendant concerned in it. At the close of all the testimony, the Government moved to admit all of the evidence against

each of the defendants (R. 390). The motion was granted, except as to the Harkins' testimony, the relevant portions of which were admitted only against Goldsmith and Weiss, respectively (R. 398, 417). and a caution as to this limitation was repeated in the instructions (R. 434). The defendants neither took the stand nor presented any testimony. Motions for directed verdict, new trial, and in arrest of judgment by some or all of the petitioners were denied (R. 30, 45). All the defendants were found guilty (R. 32). All were fined \$1,000; Feigenbaum, Abel and Blumenthal were also sentenced to eight months imprisonment, Goldsmith and Weiss to two months (R. 47-56).

Upon appeal, the Circuit Court of Appeals for the Ninth Circuit affirmed, holding that there was evidence from which the jury could properly have inferred, beyond a reasonable doubt, that there was a conspiracy and that it was a single unified conspiracy, and finding further there was no error in the admission of testimony or in the instructions (R. 482-498). A petition for rehearing was denied, Circuit Judge Denman dissenting, and withdrawing his assent to the original opinion, on the ground that the evidence showed only several separate conspiracies (R. 500-504).

ARGUMENT

1. There was ample evidence from which a jury could properly have inferred a single conspiracy

in which all the petitioners participated and in which all had knowledge of the conspiracy. See statement, *supra*. The facts point to a unified scheme to dispose of the liquor at black-market prices and to use the facilities of Francisco in so doing. Petitioners were not independent operators; they were co-workers. *Baker v. United States*, 156 F. (2d) 386 (C. C. A. 5), certiorari denied October 28, 1946, No. 484, October Term 1946. All the so-called "salesmen" operated in almost identical fashion and almost simultaneously. The liquor was drawn from the same two carloads. The incidents were not isolated and unconnected. There was affirmative evidence of connection between the various participants. It was not mere chance that at least three of them (petitioner Blumenthal, Abel and one unidentified salesman) were found at or visited the Sportorium. It is significant, too, particularly in relation to Goldsmith's and Weiss's participation in and knowledge of the conspiracy, that the sale on the premises of Francisco did not deviate from the pattern of the other sales, that some of the sales were made in the name of Weiss, and that one of the invoices given by Weiss to the warehouse was the Duffy invoice (R. 258), which was used in the sale to Duffy by an unidentified salesman (R. 348-352). Moreover, it should be noted that some of the sales by those who negotiated with the tavern keepers were made prior to the receipt of the carloads.

This is not a situation in which Goldsmith and Weiss sold whiskey to buyers who subsequently sold it illegally. Cf. *United States v. Falcone*, 311 U. S. 205. The whole picture is that of a single, integrated illegal enterprise in which all petitioners were engaged. See *United States v. New York Great Atlantic and Pacific Tea Co.*, 137 F. (2d) 459, 463 (C. C. A. 5), certiorari denied, 320 U. S. 783; *Oliver v. United States*, 121 F. (2d) 245, 248 (C. C. A. 10), certiorari denied, 314 U. S. 666; *Silkworth v. United States*, 10 F. (2d) 711, 717 (C. C. A. 2), certiorari denied, 271 U. S. 664. *Kotteakos v. United States*, 328 U. S. 750, upon which petitioners rely, is therefore inapplicable.

2. The assertion of error, by all the petitioners, in the admission of the acts and declarations of all the co-conspirators against each of them is also rebutted by the evidence outlined in the Statement and Argument.² The rule requires only that some

² The related argument by petitioner Feigenbaum, that the court improperly refused his requested instruction No. 27 (R. 458) to the effect that the jury could not consider acts of other persons in determining the existence of the conspiracy and his connection therewith (Br. No. 1165, 53-56), misconceives the rule. The existence of a conspiracy may be established by any evidence, and when the existence of a conspiracy has been shown, only slight quantitative evidence connecting a defendant therewith is sufficient to justify submission of the case to the jury. *Meyers v. United States*, 94 F. (2d) 433, 434 (C. C. A. 6), certiorari denied, 304 U. S. 583; *Marx v. United States*, 86 F. (2d) 245, 250 (C. C. A. 8);

connection be shown, otherwise than by the disputed evidence, between the conspiracy and the defendant against whom the evidence is being admitted. *Glasser v. United States*, 315 U. S. 60; *United States v. Von Clemm*, 136 F. (2d) 968 (C. C. A. 2), certiorari denied, 320 U. S. 769; *United States v. Rosenberg*, 150 F. (2d) 788 (C. C. A. 2), certiorari denied, 326 U. S. 752. Feigenbaum and Blumenthal each separately demonstrated his own connection with the general conspiracy, by his own acts in telling the buyer to prepare, and in accepting, the check and the side cash payment for Francisco and in transmitting Francisco's invoice to the buyer. See *United States v. Pecoraro*, 115 F. (2d) 245 (C. C. A. 2), certiorari denied, 312 U. S. 685.

The required showing for petitioners Goldsmith and Weiss is found in their conclusion of the arrangements for receipt and storage of the whiskey, in their preparation of invoices below ceiling price in a time of overwhelming demand for liquor and in their receipt of a flat \$1 a case apiece for their participation. And, as stated above, their participation as "legitimate" wholesalers was indispensable to the success of the conspiracy. It is significant that the trial judge waited until the close of the Government's evidence in *Galatas v. United States*, 80 F. (2d) 15, 24 (C. C. A. 9), certiorari denied, 297 U. S. 711. Here, as shown in the text, Feigenbaum's participation in the conspiracy was established by his own acts.

dence before allowing the testimony to be used against all the defendants.

3. The admission of the Harkins testimony was not error under the rule as to extra-judicial admissions announced in *Warszower v. United States*, 312 U. S. 342, as petitioners Goldsmith and Weiss contend. The evidence summarized in the Statement, *supra* offers the necessary corroboration as to the existence of the conspiracy. The corroborating evidence need not, independently, prove the conspiracy beyond a reasonable doubt. *United States v. Di Orio*, 150 F. (2d) 938 (C. C. A. 3), certiorari denied, 326 U. S. 771; *United States v. Kertess*, 139 F. (2d) 923 (C. C. A. 2), certiorari denied, 321 U. S. 795; *Chevillard v. United States*, 155 F. (2d) 929 (C. C. A. 9).

4. A conspiracy to violate the Emergency Price Control Act is an offense under Section 37 of the Criminal Code. No repeal of the conspiracy statute can be implied from Section 4 (a) of the Emergency Price Control Act, which makes it a misdemeanor to agree to violate the Act, since there is no clear repugnancy between the old and new statute. *United States v. Gilliland*, 312 U. S. 86; *United States v. Borden Company*, 308 U. S. 188. The existence of different penalties for very similar offenses does not create a repugnancy. *United States v. Gilliland*, *supra*. It has been uniformly held that Congress did not intend to except conspiracies to violate the Act from prosecution under Section 37. *Taub v. Bowles*, 149 F.

(2d) 817 (E. C. A.), certiorari denied, 326 U. S. 732; *United States ex rel Semel v. Fitch*, 66 F. Supp. 206 (D. Conn.). Cf. *United States v. Serpico*, 148 F. (2d) 95 (C. C. A. 2).³

Conclusive evidence of Congress' intent is found in the amendment to Section 204 (e) of the Act, providing that stays of criminal proceedings authorized by that section could be issued in proceedings under Section 37 of the Criminal Code. Sec. 6, Joint Resolution of June 30, 1945, 59 Stat. 306, 308. The Conference Report on that amendment shows unmistakably that it was understood that conspiracies to violate price regulations were subject to Section 37. H. Rep. No. 827, 79th Cong., 1st Sess., pp. 7-8.

Petitioner in No. 1165 presents a different contention: that the conspiracy alleged in the indictment comes within the concert of action rule. See *United States v. Katz*, 271 U. S. 354; *Gebaradi v. United States*, 287 U. S. 112. That principle is limited to the situation in which the very persons required to commit the substantive crime, and they alone, are charged with the conspiracy. *Old Monastery Co. v. United States*, 147 F. (2d) 905 (C. C. A. 4), certiorari denied, 326 U. S. 734; *Thomas v. United States*, 156 Fed. 897 (C. C. A. 8); *McKnight v. United States*, 252 Fed. 687 (C. C. A. 8). Cf. *Vannatta v. United States*, 289 Fed. 424

³ The Sherman Act cases, cited by petitioner in No. 1162, are not relevant, in view of that Act's direct coverage of conspiracies, as such (26 Stat. 209, 15 U. S. C. 1).

(C. C. A. 2). All the conspirators here were sellers; no conspiracy with the buyers is alleged.

CONCLUSION

The decision of the court below is correct and no conflict of decisions is involved. We, therefore, respectfully submit that the petitions for writs of certiorari should be denied.

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✓ THERON L. CAUDLE,
Assistant Attorney General.

✓ WILLIAM E. REMY,
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✓ APRIL 1947.

APPENDIX

Section 37 of the Criminal Code (18 U. S. C. 88):

If two or more persons conspire either to commit any offense against the United States, or to defraud the United States in any manner or for any purpose, and one or more of such parties do any act to effect the object of the conspiracy, each of the parties to such conspiracy shall be fined not more than \$10,000, or imprisoned not more than two years, or both.

Pertinent provisions of the Emergency Price Control Act, 56 Stat. 23, 58 Stat. 632, 59 Stat. 306, 50 U. S. C. App., Supp. V, 901 *et seq.*:

SEC. 4. (a) It shall be unlawful, regardless of any contract, agreement, lease, or other obligation heretofore or hereafter entered into, for any person to sell or deliver any commodity, or in the course of trade or business to buy or receive any commodity, or to demand or receive any rent for any defense-area housing accommodations, or otherwise to do or omit to do any act, in violation of any regulation or order under section 2, or of any price schedule effective in accordance with the provisions of section 206, or of any regulation, order, or requirement under section 202 (b) or section 205 (f), or to offer, solicit, attempt, or agree to do any of the foregoing.

SEC. 204. (e) (1) Within thirty days after arraignment, or such additional time as

the court may allow for good cause shown, in any criminal proceeding, and within five days after judgment in any civil or criminal proceeding, brought pursuant to section 205 of this Act or section 37 of the Criminal Code,* involving alleged violation of any provision of any regulation or order issued under section 2 or of any price schedule effective in accordance with the provisions of section 206, the defendant may apply to the court in which the proceeding is pending for leave to file in the Emergency Court of Appeals a complaint against the Administrator setting forth objections to the validity of any provision which the defendant is alleged to have violated or conspired to violate.* The court in which the proceeding is pending shall grant such leave with respect to any objection which it finds is made in good faith and with respect to which it finds there is reasonable and substantial excuse for the defendant's failure to present such objection in a protest filed in accordance with section 203 (a). Upon the filing of a complaint pursuant to and within thirty days from the granting of such leave, the Emergency Court of Appeals shall have jurisdiction to enjoin or set aside in whole or in part the provision of the regulation, order, or price schedule complained of or to dismiss the complaint. The court may authorize the introduction of evidence, either to the Administrator or directly to the court, in accordance with subsection (a) of this section. The provisions of subsections (b), (c), and (d) of this section

*Added by sec. 6 of Joint Resolution of June 30, 1945, 59 Stat. 306, 308.

shall be applicable with respect to any proceeding instituted in accordance with this subsection.

(2) In any proceeding brought pursuant to section 205 of this Act or section 37 of the Criminal Code,* involving an alleged violation of any provision of any such regulation, order or price schedule, the court shall stay the proceeding—

(i) during the period within which a complaint may be filed in the Emergency Court of Appeals pursuant to leave granted under paragraph (1) of this subsection with respect to such provision;

(ii) during the pendency of any protest properly filed by the defendant under section 203 prior to the institution of the proceeding under section 205 of this Act or section 37 of the Criminal Code,* setting forth objections to the validity of such provision which the court finds to have been made in good faith; and

(iii) during the pendency of any judicial proceeding instituted by the defendant under this section with respect to such protest or instituted by the defendant under paragraph (1) of this subsection with respect to such provision, and until the expiration of the time allowed in this section for the taking of further proceedings with respect thereto.

Notwithstanding the provisions of this paragraph, stays shall be granted thereunder in civil proceedings only after judgment and upon application made within five days after judgment. Notwithstanding the provisions of this paragraph, in the case of a proceeding under section 205 (a) the court granting a stay under this paragraph shall issue a temporary injunction.

tion or restraining order enjoining or restraining, during the period of the stay, violations by the defendant of any provision of the regulation, order, or price schedule involved in the proceeding. If any provision of a regulation, order, or price schedule is determined to be invalid by judgment of the Emergency Court of Appeals which has become effective in accordance with section 204 (b), any proceeding pending in any court shall be dismissed, and any judgment in such proceeding vacated, to the extent that such proceeding or judgment is based upon violation of such provision. Except as provided in this subsection, the pendency of any protest under section 203, or judicial proceeding under this section, shall not be grounds for staying any proceeding brought pursuant to section 205 of this Act or section 37 of the Criminal Code;* nor, except as provided in this subsection, shall any retroactive effect be given to any judgment setting aside a provision of a regulation or order issued under section 2 or of a price schedule effective in accordance with the provisions of section 206.

*Added by sec. 6 of Joint Resolution of June 30, 1945, 59 Stat. 306, 308.

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In the Supreme Court of the United States

OCTOBER TERM, 1947

HARRY BLUMENTHAL, PETITIONER

v.

UNITED STATES OF AMERICA

LAWRENCE B. GOLDSMITH, PETITIONER

v.

UNITED STATES OF AMERICA

SAMUEL S. WEISS, PETITIONER

v.

UNITED STATES OF AMERICA

ALBERT FEIGENBAUM, PETITIONER

v.

UNITED STATES OF AMERICA

**ON WRITS OF HABEAS CORPUS TO THE UNITED STATES
CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT**

PRAY FOR THE UNITED STATES

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In the Supreme Court of the United States

OCTOBER TERM, 1947

No. 54

HARRY BLUMENTHAL, PETITIONER

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No. 55

LAWRENCE B. GOLDSMITH, PETITIONER

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No. 56

SAMUEL S. WEISS, PETITIONER

v.

UNITED STATES OF AMERICA

No. 57

ALBERT FEIGENBAUM, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRITS OF CERTIORARI TO THE UNITED STATES
CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the circuit court of appeals, originally concurred in by all three of the circuit court judges sitting (R. 482-498), is reported at 158 F. 2d 883. The denial of the petition for rehearing by two of those judges, and the dissenting opinion of the other judge (R. 499-504), are reported at 158 F. 2d 762.

JURISDICTION

The judgment of the circuit court of appeals was entered December 16, 1946 (R. 504-505). Petitions for rehearing were denied February 28, 1947 (R. 505). The petitions for writs of certiorari were filed March 26, 1947, and were granted May 5, 1947 (R. 507-508). The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925. See also Rules 37 (b) (2) and 45 (a) of the F. R. Crim. P.

QUESTIONS PRESENTED

1. Whether the evidence supports the jury's finding that petitioners were engaged in a single conspiracy to sell liquor at over-ceiling prices.
2. Whether the trial court properly allowed the jury to consider against each petitioner acts performed by the others.
3. Whether there was sufficient proof of the *corpus delicti* to permit introduction in evidence of extrajudicial admissions by petitioners Goldsmith and Weiss.

4. Whether a conspiracy to violate the Emergency Price Control Act may be prosecuted under Section 37 of the Criminal Code.

STATUTES INVOLVED

The pertinent statutory provisions are set forth in the Appendix, *infra*, pp. 55-59.

STATEMENT OF FACTS

Petitioners, together with one Abel, were all convicted under an indictment returned against them in the United States District Court for the Northern District of California, charging a conspiracy to violate the Emergency Price Control Act by selling whiskey at over-ceiling prices (R. 3-6, 30-33). Blumenthal, Feigenbaum and Abel were sentenced to imprisonment for eight months and to pay a fine of \$1,000; Goldsmith and Weiss to imprisonment for two months and to pay a fine of \$1,000 (R. 47-56). On appeal the judgments were affirmed (R. 504-505); Judge Denman dissenting on petitions for rehearing on the ground that the evidence failed to establish a single conspiracy as charged in the indictment (R. 499-505).

The evidence for the Government may be summarized as follows:

Petitioner Goldsmith held a basic permit as a wholesale liquor dealer under the name of the Francisco Distributing Company, hereinafter called "Francisco" (R. 244-245). Weiss, who had formerly been Goldsmith's partner (R. 244),

was employed by Francisco (R. 252-253). None of the other defendants held a basic permit (R. 246).

On December 10, 1943, a carload of 2,076 cases of Old Mr. Boston Rocking Chair whiskey was shipped to Francisco through the Penn Midland Import Company of New Jersey (Gov. Ex. 7, R. 250). When it arrived on December 17, 1943, 1,426 cases were delivered directly from the car and 650 cases were stored in the warehouse of the San Francisco Warehouse Co. (R. 251-252, 255-256). The instructions regarding the unloading of the car were given to the warehouse by Weiss, representing Francisco (R. 252-253). A second carload of the same brand of whiskey consisting of 1964 cases was received by Francisco on December 31, 1943, and handled through the same warehouse (Gov. Ex. 8, R. 250; R. 258-259). Weiss also made arrangements with the warehouse for the handling of this carload (R. 258). Goldsmith directed the bank at which Francisco maintained its account to pay sight drafts for both carloads of whiskey (R. 267-268).

The wholesaler's ceiling price for the whiskey, calculated on the basis of purchase price, freight charges, state taxes, and permissible mark-up was \$25.27 a case (R. 275-277). Francisco had made no sales of Old Mr. Boston Rocking Chair Whiskey in the period from March 1942 to December 1943 (R. 249).

Some time between December 3 and December

6, 1943, i. e., before the whiskey had arrived in San Francisco, the defendant Abel, who worked for a jeweler in Vallejo, California (R. 278, 284), offered to sell whiskey to a restaurant owner in Vallejo named Reinburg (R. 278-279). They "dickered about the price of it, and finally arrived at a price of \$65.00 a case" (R. 279). Reinburg agreed to take 100 cases. About the 6th of December, Reinburg gave Abel a check for \$2,450 to the order of Francisco with the understanding that the balance of the agreed price would be paid in cash (R. 279-280). Reinburg agreed to this sale because the manner in which it was to be handled enabled him to keep records of his purchases as required by state law (R. 285; see R. 325-326).¹ Subsequently, when Abel brought Reinburg Francisco's invoice for the whiskey, billed at \$24.50 per case, Reinburg gave Abel the balance of the purchase price in cash (R. 279-280). Later in December, Reinburg purchased another 100 cases through Abel in the same fashion, paying \$2,450 by check to the order of Francisco and the balance in cash to Abel, and receiving Francisco's invoice for the whiskey at \$24.50 per case (R. 281).

Through Reinburg, another tavern owner, Giometti, purchased 50 cases of whiskey at the same price of \$65 per case. Payment was made in

¹ See Sec. 24.4 of the California Alcoholic Beverage Control Act, 2 California, *General Laws* (Deering, 1944), Act 3796, Appendix, *infra*, p. 59.

the same fashion, by check to the order of Francisco at the rate of \$24.50 per case and the balance in cash (R. 288-290). Subsequently, Giometti had a conversation with Abel who said that this sale had gone "through his hands" and that he could get more of the same brand at \$60 per case (R. 290-291). Abel said that he took the cash given to him to the "big shot" in San Francisco (R. 291).

While Reinburg was dealing with Abel, on December 6 or 7, he drove Abel to a sports goods shop in the down town section of San Francisco around Third Street off Market Street (R. 282). On December 16 or 17 Reinburg again drove Abel to San Francisco, dropped him at the same place, and picked him up there about a half hour later (R. 283).

Petitioner Blumenthal arranged for sales of whiskey to several persons in the back room of the Sportorium, a sports goods shop on Third Street off Market in San Francisco (R. 353). About the 3rd or 4th of December, again before the whiskey had been received by Francisco, a tavern owner named Fingerhut talked with Blumenthal at the Sportorium (R. 362). Blumenthal said that he could sell him whiskey at \$55 per case, that he did not know exactly when it would come in, but that he would get it the latter part of the month (R. 362-363). Fingerhut went back to the Sportorium a few days later and agreed to take 200 cases, 100 for himself and

100 for a man named Travis (R. 364). Blumenthal asked for and received \$4,000 in cash, and said that a check would be required later (R. 364). On December 9, Fingerhut went back to the Sportorium with Travis (R. 365, 373). On this occasion he and Travis each gave Blumenthal a check for \$2,000 to the order of Francisco and \$1,050 in cash (R. 365, 367, 374-375). Subsequently, each of them paid the balance of \$450 by checks to the order of Francisco (R. 365, 375). Blumenthal gave each of them a Francisco invoice for the whiskey which recorded a payment of \$2,000 on account and a balance due of \$450 (Gov. Ex. 58, R. 375; Gov. Ex. 52, R. 367). Two hundred cases of Old Mr. Boston Rocking Chair Whiskey, representing the purchases by Travis and Fingerhut, were delivered to Travis's warehouse (R. 365). Later in the month, Fingerhut received a telephone call asking whether he needed more whiskey (R. 366). He agreed with Blumenthal to take 25 cases and Travis agreed to take 75 cases at \$55 per case (R. 366). Payment was made in the same fashion as previously, by check to Francisco at the rate of \$24.50 per case, and the balance in cash (R. 365-366, 367-368, 376). This transaction was handled by Travis who received a Francisco invoice from Blumenthal at the Sportorium about the 3rd of January (R. 376).

Another purchaser from Blumenthal was a tavern owner in Santa Rosa named Lombardi (R. 353). About the 15th of December 1943, one

Minkler told Lombardi that there was a possibility of getting whiskey (R. 353). Minkler and Lombardi went to the Sportorium and Minkler went into the back room there (R. 354). When he returned he said, "they got in contact with somebody and the whiskey was O. K." (R. 354). A few days later Lombardi and Minkler saw Blumenthal in the back room of the Sportorium (R. 354). At that time, Lombardi gave Blumenthal \$3,050 in cash (R. 354). A few days later, Lombardi received 100 cases of Old Mr. Boston Rocking Chair Whiskey and gave Minkler a check for \$2,450 (R. 355, 356). Lombardi thus paid \$55 per case for the whiskey. Lombardi received by mail Francisco's invoice for the liquor at \$24.50 per case, with the notation "Salesman Weiss" on the document (Gov. Ex. 51, R. 355-356).

Petitioner Feigenbaum operated the Sunset Drug Store in San Francisco (R. 318, 336). About the 1st of December two tavern owners, Taylor and Humes, met a man known as "Little Joe," who said that he could get whiskey for them (R. 319-320, 332-333). Taylor gave "Little Joe" \$500 as a deposit (R. 320, 333). On December 9, "Little Joe" took Taylor and Humes to the Sunset Drug Company and introduced them to Feigenbaum (R. 318, 320-321, 333). Feigenbaum told them that if they had not appeared they would have lost their deposit (R. 317-318, 334). Feigenbaum wanted Taylor to buy 200

cases of whiskey at \$64 per case, and Taylor at first agreed to do so (R. 318, 335). Later, Taylor said that he might not be able to handle 200 cases, and Feigenbaum agreed to keep 100 cases, stating, however, that he would like to have it billed against Taylor's license (R. 318-319). At Feigenbaum's direction, Taylor's wife drew a check for \$4,900 (i. e., 200 cases at \$24.50 per case) to the order of Francisco, and Taylor also gave Feigenbaum \$1,050 in cash (R. 319, 331). Feigenbaum told Taylor and Humes that the whiskey would be in about ten days later and would be sent by truck or freight (R. 335).

On December 23, Taylor again saw Feigenbaum and inquired about the whiskey (R. 321). Feigenbaum said it would be in shortly and that it would be shipped to Taylor (R. 321, 327). At that time, Feigenbaum told Taylor the brand name of the whiskey, Old Rocking Chair, and showed him a bottle (R. 322). Feigenbaum gave Taylor a check for \$2,450 to cover the 100 cases Taylor had declined to take, and Taylor endorsed and returned the check to cover the cash payment due (R. 322). Taylor received by mail a Francisco invoice for the whiskey (R. 335).

Early in December, a tavern owner named Figone talked to a man at Francisco's office about the purchase of whiskey (R. 295-296). He understood the man's name to be Weiss but could not identify the man in the court room (R. 295, 299, 300). The man told him that the

whiskey was not in but would be received in a few days (R. 296, 297). Subsequently, Figone purchased 200 cases for himself and 75 cases for a friend from the man at Francisco (R. 296). At the direction of the man with whom he dealt, he drew a check for \$4,900 to Francisco's order and added a sufficient sum in cash to bring the purchase price to \$60 per case (R. 297-299). Figone's friend, Avila, paid for his 75 cases in the same fashion, by check to Francisco and the balance in cash (R. 300-301). He received a Francisco invoice for the liquor which showed the salesman as Weiss (R. 298-299).

A man who called himself Weiss or Wise and said he was from Francisco, called on one Cernusco in December 1943, and offered to sell him whiskey (R. 302). Cernusco could not identify the man in the court room (R. 302). Cernusco agreed to purchase whiskey for himself and two friends. He gave the Francisco representative checks to the order of Francisco in the sum of \$2,000 each, drawn by himself and his two friends (R. 301-302, 303-304). In the early part of January, the Francisco representative drove Cernusco to Third Street in San Francisco, parked the car, and went across the street (R. 302). Cernusco could not say whether or not the man went into the Sportorium (R. 302). After he came back, the man said that the whiskey was in the San Francisco warehouse, and Cernusco checked to see that it was there (R. 304-305, 306).

The man gave Cernusco a Francisco invoice for the whiskey, and Cernusco gave him two checks to the order of Francisco for \$450 each and \$6,100 in cash (R. 303-304, 306). Cernusco's friends received Francisco invoices for the whiskey, Old Mr. Boston Rocking Chair, billed at \$24.50 per case (R. 308-310).

An unidentified salesman approached a tavern owner named Vogel in San Francisco on December 6, 1943, and offered to sell him whiskey (R. 345-347). Vogel gave the salesman a check to the order of Francisco for \$2,450 (R. 346-347). About two hours later the salesman came back with a Francisco invoice for the whiskey, and Vogel gave him \$3,400 in cash (R. 346-347). Vogel subsequently received 100 cases of Old Mr. Boston Rocking Chair Whiskey (R. 347-348).

On December 3 or 4, 1943, an unidentified person approached a tavern owner named Duffy and told him he might be able to get liquor for him (R. 349-350). On December 7, this unidentified person told Duffy that he had some liquor lined up at \$24.50 a case but that there would be a premium of \$20 a case to be paid in cash (R. 350-351). On December 7, Duffy gave the man a check for \$2,000 with the name of the payee omitted. The check was later filled in with the name of Francisco as payee (R. 348-349). On December 17, the man told Duffy that the whiskey was Rocking Chair Whiskey, and that it could

be picked up at the San Francisco Warehouse (R. 351-352). Duffy gave the man a check for \$450 and \$2,000 in cash (R. 352). He received a Francisco invoice by mail sometime later (R. 352).

Goldsmith and Weiss were questioned by agents of the Alcohol Tax Unit in January, May, and September 1944 (R. 380, 382, 385). When asked about the two carloads of Rocking Chair Whiskey, Goldsmith "said that Blumenthal brought it in, and when asked if he knew of his own knowledge, he said, 'No' " (R. 382). Weiss refused to say who actually owned the whiskey. He said he knew Blumenthal, but refused to say whether Blumenthal was the owner (R. 385). At a time when both Weiss and Goldsmith were present, Weiss told the agent that Francisco had received \$2 a case for clearing the whiskey through its books, and Goldsmith concurred in that statement. They both said they had not sold any of the whiskey, that it was sold by others, and that they generally received a check in payment for the whiskey in advance of the date they were required to take up sight drafts for the liquor (R. 381).² In one of the later interviews, Gold-

² The evidence as set forth above shows that Francisco received \$24.50 a case for the liquor. It further shows that Francisco was required to pay \$19.24 to the distiller, 81 cents for freight, and \$1.92 for state taxes, a total of \$21.97 (R. 277). The receipt of \$24.50 a case thus gave Francisco a profit of \$2.53, out of which they had to pay storage charges, so that the net profit was approximately the \$2 a case that Goldsmith and Weiss admitted receiving.

smith said that he gave to Weiss half of the \$2 per case that Francisco received for handling the whiskey (R. 383), and Weiss admitted receiving half of Francisco's commission (R. 385). These admissions were received in evidence only against the party making them (R. 399).

At the start of the trial, when the Government attempted to introduce in evidence Goldsmith's wholesaler's monthly report, counsel for various defendants objected to the introduction of the exhibit on the ground that no foundation had been laid and that the testimony was not binding on their clients (R. 246-248). Similar objections were raised as each new bit of proof was offered (R. 249, 251, 253). Before the trial had proceeded very far, while documentary proof in regard to the receipt of the carloads of whiskey was being offered by the Government, the trial judge stated that he thought it would save time and be fairer to the defendants if the evidence adduced by the Government be admitted at first only as to the particular defendant to whom it appeared to be pertinent at the time, reserving to the Government the right to move for the admission of such facts against all of the defendants whenever in the Government's opinion sufficient facts had been introduced to render the testimony admissible against the other defendants (R. 254-255). At the close of its case the Government moved to admit against all the defendants all the

evidence it had presented (R. 390). Over objection by defense counsel (R. 390-398, 400-409), the court admitted against all the defendants all the testimony except the admissions by Weiss and Goldsmith (R. 398-399, 409). The judge informed the jury of his ruling (R. 417-418).

In his charge, the judge instructed the jury that in order to convict a defendant, they had to find that he joined the conspiracy charged in the indictment (R. 440-442). The judge also pointed out to the jury that defendants were not charged with the substantive offense of selling at above ceiling and instructed them that proof that a defendant sold at above ceiling would not in itself establish his guilt as a conspirator (R. 439, 441).

SUMMARY OF ARGUMENT

1. The basic question in this case is the sufficiency of the evidence to support the jury's finding that all the petitioners were engaged in a common enterprise to sell whiskey at over-ceiling prices. There is no claim that if the evidence disclosed several conspiracies, rather than a single one, the variance would not be prejudicial.

A. It is our position that all the relevant evidence clearly justified the jury in drawing the inference that the sales of whiskey here proved were consummated in accordance with a pre-arranged plan in which a number of people were involved. Before the whiskey was received in San Francisco, a number of salesmen, acting almost simul-

taneously, let it be known that they could obtain whiskey for tavern owners. Each of the salesmen knew that the transaction would be handled in such a manner as to give the sale the appearance of legitimacy; each of them knew the wholesaler (Francisco) through whom the sales would clear; each of them knew the price that would appear on the invoice, and each of them arranged for the payment of such price by check to the wholesaler, and payment of the balance in cash. The orders taken were in fact honored by the wholesaler. Despite the great demand for whiskey, the wholesaler invoiced the liquor at less than the ceiling price. The brand of whiskey sold had never before been handled by the wholesaler. All these facts together fully warrant the conclusion that a plan had been devised and arrangements made in advance for the sale of whiskey in such a manner as to give over-ceiling sales the appearance of legitimacy.

The sales proved were not separate ventures; they were part of an integrated scheme. The wholesaler was dependent on the salesmen to make sales; the salesmen were dependent on the wholesaler to give their sales the appearance of legitimacy. The wholesaler honored the orders of all the different salesmen and thus adopted the acts of all. The salesmen knew their sales were clearing through the wholesaler, and thus adopted the wholesaler's acts. In addition, each salesman

knew that the elaborate arrangements for clearing the whiskey were not devised merely to cover the comparatively small number of cases sold by him, and thus knew that the transactions in which he participated were not isolated occurrences but were part of a general enterprise. The evidence thus established a single, integrated scheme of which all the acts proved were component parts.

B. 1. In addition to the evidence detailed above, Goldsmith and Weiss admitted that they did not own the whiskey, that they allowed it to be cleared through Francisco at a profit to themselves, and that they knew it was sold by "others." The evidence therefore clearly established that these two partners had entered into an agreement with the owner of the whiskey. The question as to their guilt is whether the evidence justifies the inference that they knew that the whiskey which they had agreed to handle but did not own was being sold at over-ceiling prices.

Their actions must be judged in the light of the great demand for whiskey at the time. Since the owner was obviously not selling the whiskey without a profit to himself at such a time, Goldsmith and Weiss must have known that the owner was getting more than the \$24.50 per case which Francisco received, and hence they must have known that the invoices for \$24.50 were false. They also must have known that the owner was getting more than the ceiling price of \$25.27,

since, if he had been content to sell at ceiling price, he would have had no reason to give his customers false invoices showing sales at \$24.50. Goldsmith and Weiss thus knew that the invoices were false documents covering illegal transactions at above ceiling prices.

It is immaterial whether Goldsmith and Weiss did or did not know the exact identity of the other defendants who sold the liquor. They knew that the liquor was being sold by more than one person and they did in fact honor the orders which came to them from such persons. They thus adopted what was done by these others.

2. The complicity of petitioners Blumenthal and Feigenbaum is based on the evidence that each made sales of liquor at over-ceiling prices in the pattern established by the evidence, i. e., by taking a check to Francisco at the rate of \$24.50 per case, giving a Francisco invoice for such price, and receiving the balance in cash. This evidence justifies the inference that they participated in the conspiracy.

The gist of the conspiracy here proved was the scheme to sell liquor to tavern owners at over-ceiling prices in an apparently legitimate fashion through the medium of Francisco. The evidence as to both Feigenbaum and Blumenthal shows that each of them knew that this whiskey was coming in, knew that it would be cleared through Francisco, knew that Francisco would receive

\$24.50 per case.' Each of them therefore knew of the pre-arranged plan, the conspiracy, between the owner of the whiskey and Francisco. Each of them knowingly adopted such plan and furthered it by making sales in accordance with such plan.

In addition, each knew that the plan contemplated transactions beyond the individual sales which each effected. Since they thus knew that others were also making sales in furtherance of the common scheme, they are properly held responsible for the acts of the others.

II. Since the evidence established a single conspiracy, the court properly admitted the evidence of the acts of each petitioner against the others.

The fact that the judge waited until the end of the trial to allow the evidence to be admitted against all the petitioners did not prejudice them. The judge could not know at the outset whether or not the circumstances testified to by government witnesses would or would not justify the jury in inferring the existence of a conspiracy. Petitioners were forewarned that, if sufficient evidence of such fact was presented, the evidence allowed in as to one defendant would be admitted against the others. Had any one of them desired to cross-examine any witness not directly implicating him, he could, and upon occasion several did, cross-examine a witness whose testimony was not originally admitted against the particular defendant.

III. The evidence, other than the admissions by Goldsmith and Weiss, justifies the conclusion that the acts proved were part of a prearranged plan involving the informed and interested co-operation of more than one person to sell liquor at overceiling prices. There was thus sufficient proof of a corrupt agreement, the *corpus delicti* of the crime, to justify admission of the extrajudicial statements made by these two petitioners. The identity of the perpetrator of the crime is not part of the *corpus delicti*. *United States v. Di Orio*, 150 F. 2d 938, 939 (C. C. A. 3), certiorari denied, 326 U. S. 771.

IV. The prosecution for conspiracy to sell at overceiling prices was properly brought under Section 37 of the Criminal Code rather than Sections 4 (a) and 205 (b) of the Emergency Price Control Act. The word "agree" as used in Section 4 (a) of the Emergency Price Control Act, making it unlawful to "offer, solicit, attempt, or agree" to sell at overceiling prices is manifestly used in the sense of promise, rather than in the sense of concerted action. The amendment of Section 204 (e) to provide for stays of criminal prosecutions under Section 37 of the Criminal Code pending review by the Emergency Court of Appeals shows that Congress did not intend to repeat Section 37 in relation to conspiracies to violate the price control act.

ARGUMENT

I

THE EVIDENCE SUPPORTS THE JURY'S FINDING THAT THERE WAS A SINGLE CONSPIRACY IN WHICH ALL PETITIONERS PARTICIPATED

The basic question in this case is the sufficiency of the evidence to support the jury's finding that all the petitioners were engaged in a common enterprise to sell whiskey at over-ceiling prices. The Government does not contend that if the proof showed several conspiracies, as the dissenting judge thought, the variance would not be prejudicial. The indictment charged a single conspiracy. The judge's ruling that the evidence as to the acts of one defendant could be considered against the others shows that he believed the evidence could be found to establish a single conspiracy. The case was submitted to the jury on the basis of a single conspiracy. The jury thus found that the evidence established a single conspiracy which all the petitioners joined, and a majority of the circuit court of appeals was convinced that the evidence supported that finding. We submit that this conclusion is correct.

We shall consider first the question of the sufficiency of the evidence to establish the existence of a single conspiracy, then the sufficiency of the evidence to show participation in that conspiracy by each of the individual petitioners, and finally the function of this Court in relation to such evidence.

A. The sufficiency of the evidence to establish a conspiracy.—In essence, the factual situation presented by the evidence in this case is as follows:

Some weeks before whiskey arrives at a wholesaler's place of business, at a time when the demand for whiskey is very great, a number of persons, acting almost simultaneously, let it be known that they can obtain whiskey for tavern owners. Some of these persons are not regularly engaged in the business of selling liquor. All these salesmen know that the transaction can be handled in a manner which will give it the appearance of a legitimate purchase from a wholesaler—a factor of great importance to the tavern owners, since it enables them to comply with the record-keeping requirement of state law. All the salesmen know the name of the wholesaler through whom the sales will clear. All of them know the price that will appear on the wholesaler's invoice, a price somewhat less than the wholesaler's legitimate selling price. All of them make arrangements for the payment of that price by check to the wholesaler and for the receipt of an additional sum in cash. When the first carload of whiskey arrives, a substantial portion thereof is immediately delivered in accordance with the arrangements made by the salesmen. Such deliveries are made in accordance with directions given to the warehouse by the wholesaler's representative. The

brand of whiskey sold is one never before handled by the wholesaler. Despite the great demand, the wholesaler is willing to sell at less than ceiling price, and he disposes of two carloads of whiskey at such price. The question here is whether a jury is justified in finding that these separate facts dovetail too neatly to be the result of mere chance, and that the whole pattern of all the evidence justifies the conclusion that some person or some group of persons planned and made arrangements for these transactions in advance.

We submit that the evidence here clearly establishes a plan even though the identity of the planners may be in doubt. Someone had to make arrangements to get the whiskey to San Francisco; someone had to make arrangements to have it clear through Francisco, the wholesaler; someone had to fix Francisco's price; someone had to tell the salesmen that the whiskey was coming in, that Francisco would honor their orders at less than ceiling prices, and would give them invoices at such prices; someone had to see that the orders taken were transmitted to Francisco—someone had to, and did, arrange all this before the whiskey first arrived in San Francisco. It is to be noted that none of the identified salesmen were regularly engaged in the business of selling liquor. Feigenbaum was a druggist, Abel worked for a jeweler, and Blu-

mental apparently operated the Sportorium. They were thus not in a position where knowledge of the incoming shipment would come to them in the normal course of their activities. That knowledge had to be conveyed to them by someone. The jury was therefore fully justified in finding that there was a plan, a carefully worked out plan, to get whiskey to tavern owners at over-ceiling prices in a manner having the appearance of legitimacy.

Furthermore, the evidence justifies the inference that each person participating in that plan knew that he was merely part of a larger enterprise which necessarily involved the informed and interested cooperation of others. The wholesalers, who handled two carloads of whiskey and honored orders obtained by a number of different salesmen, must have been aware that a number of persons were engaged in selling the whiskey.³ Each salesman, who knew of the arrangements by which the liquor was to clear through the wholesaler, must have been aware that those elaborate arrangements were not made for the purpose of selling the two or three hundred cases that each of them sold. Each was therefore aware that particular transactions were not isolated occurrences but part of a single integrated scheme. Hence, when each of them knowingly

³ We discuss this point in more detail at pp. 34-36, *infra*, in considering the liability of petitioners Goldsmith and Weiss.

joined and furthered that plan in one way or another, each of them became liable for the acts of the others.

The pattern here is not the same as that before this Court in *Kotteakos v. United States*, 328 U. S. 750, 755, of separate spokes meeting at a common center, "without the rim of the wheel to enclose the spokes." The pattern here is that of a number of players directed by a guiding hand pursuant to a preconceived plan in which each knows that he is playing but a part—a wholly different situation. In the Government's brief in the *Kotteakos* case, when we conceded the existence of separate conspiracies on the basis of the facts there proved, we distinguished the situation there presented from others in which the courts had held that a single conspiracy of many component parts had been established. (See Gov. Br. Nos. 457 and 458, O. T. 1945, pp. 21-22.) As we there pointed out, the courts have held that where a person joins an enterprise which he knows requires participation of others for its success, he may properly be held liable for the acts of the others, although he is unaware of their identity, or even of the exact nature of their contribution to the common cause. Thus, in cases involving liquor or narcotics rings, it has been held that different groups, sometimes operating in scattered parts of the country, were properly joined under one conspiracy charge, since all were aware that they were part of a larger enterprise

and that their stake in the venture was dependent upon the success of other groups. *United States v. Bruno*, 105 F. 2d 921 (C. C. A. 2), reversed on other grounds, 308 U. S. 287; *United States v. Feinberg*, 123 F. 2d 425 (C. C. A. 7), certiorari denied, 315 U. S. 801; *Chadwick v. United States*, 117 F. 2d 902 (C. C. A. 5), certiorari denied, 313 U. S. 585. See also *Martin v. United States*, 100 F. 2d 490, 495 (C. C. A. 10), certiorari denied, 306 U. S. 649, involving a nation-wide plan to violate the Motor Carrier Act. Also, one central figure or one central group may be sufficient to bind many separate individuals together into one conspiracy under certain circumstances, as, for example, when the central group dominates the enterprise, and the lesser members know that they are merely a small part of a greater plan. See *United States v. New York Great Atlantic and Pacific Tea Co.*, 137 F. 2d 459, 463 (C. C. A. 5), certiorari denied, 320 U. S. 783; *Oliver v. United States*, 121 F. 2d 245, 248 (C. C. A. 10), certiorari denied, 314 U. S. 666; *Silkworth v. United States*, 10 F. 2d 711, 717 (C. C. A. 2), certiorari denied, 271 U. S. 664.

The situation here is governed by the principles enunciated in those cases. Here there was both domination and interdependence. Some person or group of persons planned the scheme and made the arrangements. In addition, each group of defendants was dependent on the other. Francisco would not have received money for handling

the whiskey unless the whiskey was sold to tavern owners. The salesmen could not sell the whiskey unless they knew that the whiskey was coming in, and that it was being handled by a legitimate wholesaler in order to give the sale the appearance of conformity with the requirements of state law. In addition, as we have shown, each of them knew that he was a part of a single larger venture extending beyond the immediate transactions in which he personally was involved. Each thus knowingly furthered the common enterprise by which the whiskey was received in San Francisco and sold to tavern owners at illegal prices with the trappings of legality.

Petitioners and the dissenting judge both err in assuming that the mere fact that the evidence does not show that petitioners knew each other's identity is sufficient to fit this case into the *Kotteakos* pattern. Nothing in the *Kotteakos* decision changes the well established rule of conspiracy law that one may be held liable as a co-conspirator although he does not know the full scope of the conspiracy and does not participate in all its acts. *United States v. Valenti*, 134 F. 2d 362, 365 (C. C. A. 2), certiorari denied, 319 U. S. 761; *Lefco v. United States*, 74 F. 2d 66 (C. C. A. 3); *Jejewski v. United States*, 13 F. 2d 599, 602 (C. C. A. 6), certiorari denied, 273 U. S. 735; *Allen v. United States*, 4 F. 2d 688 (C. C. A. 7), certiorari denied *sub nom. Hunter v. United States*, 267 U. S. 597; *Marino v. United States*,

91 F. 2d 691, 696 (C. C. A. 9), certiorari denied *sub nom. Gullo v. United States*, 302 U. S. 764; *Martin v. United States*, 100 F. 2d 490, 496 (C. C. A. 10), certiorari denied, 306 U. S. 649. It is enough that there is an integrated scheme to accomplish an illegal purpose, and that each member knows that he is aiding the illegal venture in which others are involved. See *Interstate Circuit v. United States*, 306 U. S. 208, 226-227.

It is, of course, true that the existence of the conspiracy was not the subject of direct testimony but had to be inferred from all the circumstances proved. But the mere fact that a conspiracy must be inferred from circumstances does not render the evidence insufficient. As this Court pointed out in *Direct Sales Co. v. United States*, 319 U. S. 703, 714, proof of conspiracy "by the very nature of the crime, must be circumstantial and therefore inferential to an extent varying with the conditions under which the crime may be committed." "Participation in a criminal conspiracy need not be proved by direct evidence; a common purpose and plan may be inferred from a 'development and a collocation of circumstances.'" *Glasser v. United States*, 315 U. S. 60, 80.

Petitioners are apparently under the impression that overt acts by the defendants themselves cannot be considered in determining the existence of a conspiracy. The theory of all is articulated in instructions Nos. 27-29 sought by petitioner

Feigenbaum (R. 458-459), the omission of which from the judge's charge, he assigns as error (Pet. 53-56). Petitioners are clearly under a misapprehension. Any relevant evidence, including the acts of defendants (other than evidence such as confessions admissible against one party alone) may properly be considered by the jury in determining the existence of an underlying purpose or plan. The Circuit Court of Appeals for the Seventh Circuit has thus expressed the well-established rule in *United States v. Holt*, 108 F. 2d 365, 368-369 (C. C. A. 7), certiorari denied, 309 U. S. 672:

True it is, that if the evidence is as consistent with the innocence of the appellant as with his guilt, no conviction can be had. It is equally true that overt acts of the parties may be considered with other evidence and attending circumstances in determining whether a conspiracy exists, and where the overt acts are of the character which are usually, if not necessarily, done pursuant to a previous scheme and plan, proof of the acts has a tendency to show such pre-existing conspiracy, so that when proven they may be considered as evidence of the conspiracy charged. * * *

See also *American Tobacco Co. v. United States*, 328 U. S. 781, 789; *McDonald v. United States*, 133 F. 2d 23, 24 (App. D. C.); *Rich v. United States*, 62 F. 2d 638, 640 (C. C. A. 1), certiorari denied, 289 U. S. 735; *Pastrano v. United States*, 127 F. 2d 43, 44 (C. C. A. 4); *Davidson v. United*

States, 274 Fed. 285, 287 (C. C. A. 6); *Safarik v. United States*, 62 F. 2d 892, 896 (C. C. A. 8); *Marx v. United States*, 86 F. 2d 245, 250 (C. C. A. 8); *Garhart v. United States*, 157 F. 2d 777, 781 (C. C. A. 10).

Petitioners are confused by the rule that, before a jury can impute the acts of one conspirator to the others, the jury must first find by independent evidence that a particular defendant has joined the conspiracy. *Glasser v. United States*, 315 U. S. 60, 74. That rule, however, has reference, not to the determination of the existence of a conspiracy, but to the responsibility of a particular defendant as a conspirator. The jury must first determine from all the relevant evidence, including the overt acts of the parties, whether or not an agreement, an underlying plan, has been shown. Once that fact has been found, the jury must then determine whether the particular defendant was or was not a member of that conspiracy. To make this secondary determination, it can under the rule enunciated in the *Glasser* case, *supra*, consider only evidence directly relating to that particular individual, although, once a conspiracy has been shown, slight evidence is sufficient to connect a particular defendant therewith. *Phelps v. United States*, 160 F. 2d 858, 867-868 (C. C. A. 8); *Meyers v. United States*, 94 F. 2d 433, 434 (C. C. A. 6), certiorari denied, 304 U. S. 583; *Marx v. United States*, 86 F. 2d 245, 250 (C. C. A.

8); *Galatas v. United States*, 80 F. 2d 15, 24 (C. C. A. 8), certiorari denied, 297 U. S. 711. Then, having found that a particular defendant has joined the conspiracy, it may impute to each member of the conspiracy the acts of all the other conspirators in furtherance of the conspiracy, *Pinkerton v. United States*, 328 U. S. 640, and thus determine whether guilt has been proved beyond a reasonable doubt.

Proving a conspiracy by the acts of the defendants is not proving a conspiracy by hearsay. The acts testified to by the various witnesses are facts proved in the same manner as any other facts, and if those facts justify the inference that there was an agreement, they constitute adequate proof of the crime. We do not have here the situation before this Court in the *Glasser* case where proof of the membership in the conspiracy of one individual depends upon statements by others that such person is a member. *Fiswick v. United States*, 329 U. S. 211, holding that confessions made after termination of the conspiracy are inadmissible against co-defendants is wholly inapplicable. Here the proof admitted against all related to acts, not declarations or admissions, and the jury was merely allowed to deduce that the acts proved were performed in furtherance of a common design.

B. The sufficiency of the evidence of participation by each of petitioners.

Goldsmith and Weiss.—Every one of the sales to which Government witnesses testified cleared

through Francisco; i. e., Francisco honored the orders obtained by Abel, Feigenbaum, Blumenthal, and the unidentified persons mentioned in the Government's testimony. In every such case, Francisco received slightly less than the ceiling price for the whiskey and gave an invoice for the price it received. Among the orders honored were orders obtained before the whiskey had arrived in San Francisco. The brand of whiskey sold had never before been handled by Francisco. Goldsmith and Weiss represented Francisco. Goldsmith was the owner and gave the orders for payment of the sight drafts for the liquor. Weiss was a former partner and employee, and gave orders to the warehouse for the transfer of the liquor to the tavern owners.

It is against this background that the admissions by Weiss and Goldsmith must be considered.* They admitted that they did not own the whiskey, that they allowed it to be cleared through Francisco at a profit to themselves, and that they knew it was sold by "others," i. e., more than one. Even the dissenting judge below conceded that these admissions, coupled with the other evidence in the case, proved an agreement between Goldsmith and Weiss on the one hand and the unknown owner of the whiskey on the other (R. 503). As to these defendants, his point,

* We discuss, *infra*, pp. 48-50, the sufficiency of the proof of the *corpus delicti* to support the admission of these statements.

which these petitioners have adopted here, is that the evidence is insufficient to show that the agreement was for the purpose of disposing of the whiskey at overceiling prices, rather than for some other purpose.

As to Goldsmith and Weiss, therefore, the real question is, not whether the evidence is sufficient to show that they joined a conspiracy, but whether the evidence is sufficient to justify the jury in inferring that they knew that the conspiracy which they joined was one to sell whiskey at overceiling prices. In other words, the basic question as to them is whether the evidence is sufficient to support the inference that they knew that the whiskey, which they did not own but which they had agreed to handle, was being sold at overceiling prices.

We submit that the evidence was clearly sufficient to justify that inference. The acts of Goldsmith and Weiss must be judged in the light of the times in which they acted. The great demand for whiskey in December of 1943, and the willingness of tavern owners to pay black market prices therefor was a matter of common knowledge, amply developed by the testimony of the government witnesses (see e. g., R. 285, 297). Goldsmith and Weiss knew from the orders they received, even before the whiskey arrived in San Francisco, that it was being transferred to tavern owners. They must have known the requirements of the California laws as to the keeping of

records. The evidence further shows that Francisco was required to pay \$19.24 to the distiller, \$0.81 for freight, and \$1.92 for state taxes, a total of \$21.97 (R. 277). The receipt of \$24.50 per case gave Francisco a profit of \$2.53, out of which they had to pay storage charges, so that their net profit was approximately the \$2.00 per case that Goldsmith and Weiss admitted receiving. Obviously the jury was warranted in inferring that Goldsmith and Weiss knew that the owner, whose identity was doubtless known to them if not to the Government, was not distributing the whiskey to tavern owners without a profit to himself and that he was therefore getting more than \$24.50 per case. He was either content with the small difference between \$24.50 per case and the ceiling price of \$25.27, a profit of 77¢ per case, or he was selling at over-ceiling prices. The evidence shows, however, that Goldsmith and Weiss must have known that the owner was getting more than \$25.27 per case. They knew that the tavern owners were getting invoices showing the purchase price as \$24.50. If such tavern keepers were really paying only the legitimate ceiling price, what reason would they have for accepting false invoices showing a lesser price than they paid?

The evidence shows that most of the tavern owners met the requirements of the California law (App., *supra*, p. 59) by keeping the original invoices (R. 285, 289, 298, 335, 356, 375). It is a justifiable, an almost inescapable, inference from the evidence

that Goldsmith and Weiss knew that the unknown owner was getting much more than \$24.50 per case, and that the invoices at \$24.50 per case were false documents used to give the color of legality to illegal transactions.⁵ Under these circumstances, we submit that the jury was justified in concluding that when Weiss and Goldsmith made arrangements with the owner to clear his whiskey to tavern owners they must have known that the whole purpose of the transaction was to give black market sales the appearance of legitimacy. And if they knew that much, they knew enough to render them liable to prosecution for conspiracy.

It is immaterial whether Goldsmith and Weiss did or did not know the exact identity of the other

⁵ Goldsmith and Weiss (G. Br. 3-4; Pet. 31-32) allude to the fact that the Government's proof related to only 1,575 of the total shipment of 4,040 cases. However, the mere fact that the Government did not call every purchaser does not mean that the other sales were proper. Any number of reasons might account for the failure to call other witnesses. Perhaps the prosecutor thought the evidence would be cumulative; perhaps the witnesses refused to incriminate themselves; perhaps some of them could not be found. Goldsmith and Weiss admitted that they sold none of the whiskey themselves. The documentary evidence (Gov. Exs. 10, 11, 13, and 14, R. 257, 259, 262) shows that all of it was invoiced at \$24.50 per case. The inference therefore is that all was sold according to the usual pattern. The testimony of the Government witness Lombardi shows that one purchaser who did not testify, Minkler, had purchased at black market prices (Cf. R. 354-355, with Gov. Ex. 13, R. 259, showing invoice to Minkler) but had moved to New Mexico before the trial (R. 356). The Government's proof did show black market sales of a substantial portion, more than a third, of the two carloads.

defendants who sold the liquor.⁶ They knew that the liquor was being sold by "others," more than one person. Whether they had agreed in advance with the unknown owner to honor the orders given to them by particular individuals, or whether they had agreed generally to accept such orders as were transmitted to them, no matter how obtained, the evidence indisputably establishes that they did in fact honor the orders of Blumenthal, Feigenbaum and Abel, and several unidentified persons. Whatever the relationship between the salesmen and the unknown owner of the whiskey, so far as Goldsmith and Weiss were concerned they were carrying out their arrangement with him to transfer the whiskey to the purchasers obtained in one fashion or another. And since Goldsmith and Weiss did know that more than one seller was involved, since they did honor the orders of their co-defendants, and since, as we have shown, they must have known that these were black market sales, they adopted what was done by these co-defendants in selling the liquor. They either knew, or they did not care, how the orders were secured. They cannot now disclaim responsibility on the theory that they did not know the exact details by which their basic arrangement with the owner of the whiskey was carried into effect.

This Court has held that, in order to hold a person liable as a co-conspirator, it is not neces-

⁶ By their own admissions they did know Blumenthal.

sary that the parties agree in advance on the exact details by which the unlawful object is to be effected. In *Frohwerk v. United States*, 249 U. S. 204, 209, Mr. Justice Holmes said:

* * * a conspiracy to obstruct recruiting would be criminal even if no means were agreed upon specifically by which to accomplish the intent. It is enough if the parties agreed to set to work for that common purpose.

A guilty person cannot "avoid his liability by proof that the exact nature and full details of the scheme were not communicated to him." *Russell v. Post*, 138 U. S. 425, 431. If Goldsmith and Weiss knew that the orders they were filling were black-market orders, and we think it is clear that they did, they are in no position to claim unfairness because they were tried with the persons who obtained such orders. They operated with a "ring" and were responsible for the actions of the "ring."

The doctrine of *United States v. Falcone*, 311 U. S. 205, cited by petitioner Goldsmith (Br. 5; Pet. 27-28) does not aid these petitioners. In the first place, the *Falcone* decision turned on the fact that there was insufficient evidence to show that the seller knew that the buyer was conspiring with others. Here Goldsmith and Weiss, by their own admissions, did know that the whiskey was being sold by more than one person. Furthermore, the arrangements between Goldsmith and Weiss and

the unknown owner of the whiskey were not in the same category as a simple act of sale which could be transacted without prearrangement. Here there had to be arrangements made before the whiskey was received by Francisco, a course of procedure set, and a price fixed. Moreover, the interest of Francisco did not cease when the arrangements were made; so long as there was liquor to be sold, Francisco had a stake in the venture. As even the dissenting judge below conceded (R. 503), this evidence clearly showed an agreement. And since, as we have shown, the evidence fully justifies the inference that the agreement contemplated the sale of liquor at over-ceiling prices, it establishes the conspiracy charged in the indictment.

The mere fact that, on the surface, Goldsmith and Weiss performed no illegal act is not sufficient to absolve them from guilt as co-conspirators. Their innocent appearing actions were the crux of the conspiracy here proved, since the color of legitimacy was an essential part of the plan to dispose of the liquor to tavern owners at over-ceiling prices. As we have shown, the jury was justified in inferring that these two petitioners knowingly participated in that plan. The jury was therefore justified in finding them guilty of conspiracy to sell liquor at black-market prices. In *Direct Sales Co. v. United States*, 319 U. S. 703, each individual sale of narcotics by the defendant company complied

with all requirements of federal law and was not illegal on the surface. This Court nevertheless found that the company had been properly convicted of conspiracy with the buyer to violate the narcotic laws because of the company's "informed and interested cooperation" in the buyer's illegal purpose. The same "informed and interested cooperation," including a "stake in the venture," was proved here.

Blumenthal and Feigenbaum.—Although there is some evidence, such as the statement by Blumenthal that he was getting in liquor and the centering of activities at the Sportorium where Blumenthal did business, that Blumenthal may have had a greater interest in the whole venture than that of a mere salesman, his liability as a conspirator, as well as that of Feigenbaum, depends on the evidence as to each of them that each made sales of liquor to tavern owners at over-ceiling prices in the usual pattern established by the evidence, i. e., by taking a check

It should be noted that the very fact that Francisco's actions were not illegal on their face justifies the bringing of the conspiracy charge here. The essential crime by Goldsmith and Weiss was the crime of conspiracy, and, if tried for the substantive offense, their liability would depend on application of the rules of conspiracy law to them under the principles enunciated by this Court in *Pinkerton v. United States*, 328 U. S. 640. Since, therefore, a conspiracy trial was necessary to reach these individuals, and since proof of the conspiracy did in part rest on the acts of the other defendants, there is a practical, as well as a legal, justification for the joint trial here.

to Francisco at the rate of \$24.50 per case, giving a Francisco invoice at such price, and receiving the balance in cash. Such evidence in and of itself is sufficient to support the jury's finding that these two petitioners joined and furthered the conspiracy charged and proved.

The fundamental error in the opinion of the dissenting judge and the argument of these petitioners is their ignoring of the essential interdependence of the activities of all who were accused. The plan here was not merely to sell liquor at over-ceiling prices; it was a plan to sell liquor at over-ceiling prices in an apparently legitimate fashion. The core of the scheme was the arrangement by which the whiskey would clear to tavern owners through Francisco, a legitimate wholesaler. The evidence as to both Feigenbaum and Blumenthal shows that each of them knew that the whiskey was coming in, knew that it would be cleared through Francisco, knew that Francisco was to receive \$24.50 per case, and knew that Francisco would give the buyers invoices for the whiskey. Each of them therefore knew of the pre-arranged plan, the conspiracy, between the owner of the whiskey and Francisco, to give the black-market sales the appearance of legitimacy. Each of them thus adopted and furthered a known conspiracy. Each of them was therefore properly treated as a co-conspirator, whether he knew of the con-

spiracy at the moment of its inception or acquired that knowledge when he participated therein, whether he did or did not know all the other persons who adopted and aided that basic scheme. *Van Riper v. United States*, 13 F. 2d 961, 967 (C. C. A. 2), certiorari denied *sub nom. Ackerson v. United States*, 273 U. S. 702; *Baker v. United States*, 21 F. 2d 903, 905 (C. C. A. 4), certiorari denied, 276 U. S. 621; *United States v. Feinberg*, 123 F. 2d 425, 427 (C. C. A. 7), certiorari denied, 315 U. S. 801. O

It is unimportant that the salesmen may not have known each other. They obviously knew that the elaborate arrangements, of which, as we have shown, they were informed, were not made for the purpose of selling the several hundred cases which each of them sold. Each of them, therefore, knew that he was merely one agent to effectuate a broad illegal scheme in which others were also involved. When, in his own interest, each of them did adopt and further that scheme, he became a party to the conspiracy with the others, and became liable for their acts. Salesmen have consistently been held responsible for their contribution to the perpetration of an illegal scheme in which they know other salesmen are employed, even though their actual participation was limited to their selling activities. *Blue v. United States*, 138 F. 2d 351 (C. C. A. 6), certiorari denied, 322 U. S. 736; *United States*

v. *Beck*, 118 F. 2d 178 (C. C. A. 7), certiorari denied, 313 U. S. 587. Since each salesman, by making sales under the circumstances indicated, necessarily joined a known conspiracy, he was properly treated as a co-conspirator with the others.

C. *The function of the appellate court in relation to the evidence.*—In cases such as this, where the determination of guilt depends upon the drawing of inferences from the circumstances proved, it has become almost routine for convicted defendants seeking appellate review of the sufficiency of the evidence to urge that circumstantial evidence is insufficient if the circumstances proved are as consistent with innocence as with guilt. The ghost of that contention in relation to the functions of appellate courts has, we think, been finally laid by the exhaustive discussion thereof in *Curley v. United States*, 160 F. 2d 229 (App. D. C.), certiorari denied, Nos. 1211 and 1235, O. T. 1946, June 2, 1947. As that opinion points out, the principle that an acquittal must be had if the circumstances are as consistent with innocence as with guilt, is essentially a rule for the jury, and not for the appellate court.* It hardly needs to be iterated now that, in reviewing the sufficiency of the evidence to support a conviction, the function of an appellate court is not to reach an independent determina-

* The judge did give such an instruction to the jury (R. 443).

tion of guilt or innocence, but to decide merely whether "there was some competent and substantial evidence before the jury fairly tending to sustain the verdict." *United States v. Socony-Vacuum Oil Co.*, 310 U. S. 150, 254; *Glasser v. United States*, 315 U. S. 60, 80; *Gorin v. United States*, 312 U. S. 19, 32; *Pierce v. United States*, 252 U. S. 239, 251-252; *Stilson v. United States*, 250 U. S. 583, 588-589; *Abrams v. United States*, 250 U. S. 616, 619.

At most, the doctrine relied upon by petitioners means no more than that the evidence must be considered insufficient if, taken in the light most favorable to the Government and with all possible inferences drawn in favor of the Government, it is still as consistent with innocence as with guilt. It does not mean that where the inferences that can reasonably be drawn from the Government's evidence may establish guilt beyond a reasonable doubt, the verdict must be reversed merely because, by indulging in every possible inference in favor of a defendant, it is possible to devise an innocent explanation of defendant's conduct. It is the function of the jury, and not of an appellate court, to draw inferences from the evidence. It is for the jury to determine whether the inferences which reasonably can be drawn from the circumstances proved are sufficient to establish guilt beyond a reasonable doubt. *Yoffe v. United States*, 153 F.

2d 570, 573 (C. C. A. 1); *United States v. Valenti*, 134 F. 2d 362, 364 (C. C. A. 2), certiorari denied, 319 U. S. 761; *United States v. Brandenburg*, 155 F. 2d 110, 112 (C. C. A. 3); *Roberts v. United States*, 151 F. 2d 664, 665 (C. C. A. 5); *Blalock v. United States*, 154 F. 2d 591, 594 (C. C. A. 6), certiorari denied, 329 U. S. 738; *United States v. Levy*, 138 F. 2d 429, 430-431 (C. C. A. 7), certiorari denied, 321 U. S. 770; *Scott v. United States*, 145 F. 2d 405, 408 (C. C. A. 10), certiorari denied, 323 U. S. 801.

Here a jury had before it substantial evidence from which, in the exercise of its right to draw inferences from the evidence, it could reasonably conclude that there was a single, integrated conspiracy to sell liquor at over-ceiling prices in a manner having the appearance of legitimacy, and that each of the petitioners knowingly entered into or adopted such conspiracy and furthered it by his own acts. There was therefore ample evidence to support the verdict.

II

SINCE THE EVIDENCE ESTABLISHES A SINGLE CONSPIRACY, THE COURT PROPERLY ADMITTED THE EVIDENCE OF THE ACTS OF EACH PETITIONER AGAINST THE OTHERS AND ALLOWED THE JURY TO CONSIDER SUCH EVIDENCE AGAINST ALL

Petitioners' objections to the court's ultimate ruling, allowing all the testimony adduced by the Government, other than the admissions of Goldsmith and Weiss, to be considered by the jury against all the defendants, is based upon their

contention that the evidence fails to establish a single conspiracy. Since, as we have shown, the evidence does in fact support the jury's finding that there was a single conspiracy as charged in the indictment, petitioners' arguments fall with their premise.

There remains to be considered the mechanics by which the testimony was admitted in evidence against all. As noted in the Statement, *supra*, pp. 13-14, the judge, after first receiving the Government's proof generally, decided to admit it only against the person to whom it directly related, reserving to the Government the right later to move to have it admitted against all the defendants. At the close of the trial, he admitted against all the defendants all the testimony except the admissions of Goldsmith and Weiss.

The reason behind the judge's procedural ruling is evident. Where the existence of a conspiracy must be proved by a collocation of circumstances, it is manifestly impossible to get all the evidence in at the same time. And when the circumstances from which the conspiracy must be inferred consist, as here, in part of the acts of the various defendants, the proof which tends to show the existence of a conspiracy will at the same time tend to show the participation of a particular defendant in the conspiracy. As a result, all the Government's evidence may have to be adduced before the judge can conclude that a jury would be justified in finding the fact of

conspiracy. He cannot know at the outset whether the Government's evidence relating to conduct by the various defendants will or will not establish a conspiracy, and whether it will or will not tend to show the participation of a particular defendant in that conspiracy. Faced with that practical difficulty, a judge has two alternatives. He may at the outset allow proof of the acts of each of the parties in evidence against all, subject to having it stricken out if the connection to the conspiracy is not shown, or he may allow it in evidence only against the person to whom it relates, subject to having it admitted against the others when sufficient proof has been adduced to justify the inference that a conspiracy did exist.

It is the more common practice to follow the first of these alternatives, and the judge here did follow that procedure in the beginning. It soon became apparent, however, that such a procedure would result in undue delay of the trial since each attorney for each defendant felt called upon to object to every item of the Government's proof. The early part of the trial record reveals almost as much space taken up with objections by counsel as with the testimony of witnesses.* As a result, the judge adopted the alternative method and stated that he would allow the evidence to be admitted at first only against the party to whom

*Testimony appears at R. 243-246, 248-249, 250-251; objections at R. 246-248, 249, 251.

it related, reserving to the Government the right later to offer it in evidence against all (R. 254-255).

We cannot see that petitioners are in a position to complain because one method was followed rather than the other. Either method is merely an accommodation of legal principles to the practical difficulty that a jury cannot hear ten witnesses at the same time, and that one witness will often testify to facts which tend to establish, not only the existence of a conspiracy, but the participation of an individual defendant therein. As the Court of Appeals for the District of Columbia said in *McDonald v. United States*, 133 F. 2d 23:

* * * The logical sequence of events—from agreement in a common purpose to perpetration of an act designed to carry it out—does not require that introduction of the evidence must follow the same rigorous sequence. In fact, commission of the overt act may constitute the best proof of the conspiracy and such evidence is often used for that purpose.

The order of proof and its admission in cases of this character is a matter for the discretion of the trial judge. *Hoepfel v. United States*, 85 F. 2d 237, 242 (App. D. C.); cf. *Delaney v. United States*, 263 U. S. 586, 590. The method adopted here in no way prejudiced petitioners. They were forewarned by the judge's ruling that, if the Government's proof did tend to establish a conspiracy, the evidence offered against one would

be admitted against the others. They thus knew that the testimony of each witness called by the Government might eventually be offered against each of them. If any one of them desired to cross-examine a witness who did not directly implicate him, he could have done so. In fact, some of the petitioners did upon occasion cross-examine a witness whose testimony was not originally admitted against that petitioner. Feigenbaum's attorney (R. 239) cross-examined the representative of the San Francisco warehouse whose testimony was admitted only against Goldsmith and Weiss (R. 263, see R. 255, 261); Blumenthal's attorney (R. 239) cross-examined Reinburg who dealt with Abel (R. 288, see R. 279) and Cernusco who dealt with an unidentified salesman (R. 307, see R. 305); Weiss, representing himself (R. 239), cross-examined Lombardi who dealt with Blumenthal (R. 361, see R. 353).

The important fact is that in the end enough had been shown to justify submission of all this evidence to the jury in order to enable them to determine whether it was sufficient to establish guilt. Petitioners, who were forewarned of the possibility that the evidence might be admitted against them, were certainly not prejudiced because the judge waited to be convinced that the jury could reasonably conclude that a conspiracy did exist before he would allow the evidence to

go to the jury on this point. If his ultimate conclusion on the right to infer a conspiracy from the proof was correct, and we have shown that it was, then his ultimate ruling on the right of the jury to consider that evidence was also correct.

III

SINCE THE FACTS OTHER THAN THEIR ADMISSIONS TENDED TO PROVE A CONSPIRACY, THERE WAS SUFFICIENT PROOF OF THE CORPUS DELICTI TO JUSTIFY ADMISSION OF THE EXTRA-JUDICIAL STATEMENTS BY GOLDSMITH AND WEISS

The contentions of Goldsmith and Weiss that there was insufficient proof of the *corpus delicti* to justify the admission against them of their extra-judicial statements, has also been answered by our argument in Point I A of this brief, *supra*, pp. 21-30, showing the justification for the jury's conclusion that a conspiracy had been proved. As we there pointed out, the simultaneous action of a number of salesmen before the whiskey had arrived at San Francisco, their knowledge of the method by which the sales were to be handled, the fact that Francisco honored the orders thus taken, all tended to show the existence of a preconceived plan, involving the cooperation of several persons, to sell liquor at over-ceiling prices with the trappings of legality. It may be that, without the admissions by Goldsmith and Weiss, there would be basis for an inference that they were the owners of the whiskey, the arrangers and planners of the whole scheme,

although the facts that they sold at less than ceiling price, and that they had never before handled the brand of whiskey involved tend to negative that inference. Even assuming, however, that without their confessions, their part in the venture might appear to be greater than it was, it is still true that the evidence other than their admissions would tend to show the existence of a corrupt agreement between them and others, to get whiskey to San Francisco and distribute it to tavern owners at over-ceiling prices under cover of false invoices. There was thus independent evidence of the agreement, the *corpus delicti* of the crime charged. *United States v. Di Orio*, 150 F. 2d 938, 939 (C. C. A. 3), certiorari denied, 326 U. S. 771; *United States v. Kertess*, 139 F. 2d 923, 929 (C. C. A. 2), certiorari denied, 321 U. S. 795.

Petitioners are wrong in their contention that there must be independent evidence, other than the admissions, of the complicity in the conspiracy of the individual defendants who made the admissions. "Proof of the identity of the perpetrator of the act or crime is not a part of the *corpus delicti*." *United States v. Di Orio*, *supra*; *George v. United States*, 125 F. 2d 559, 563 (App. D. C.); *Anderson v. United States*, 124 F. 2d 58, 66 (C. C. A. 6), reversed on other grounds, 318 U. S. 350; *Ryan v. United States*, 99 F. 2d 864, 870 (C. C. A. 8), certiorari denied, 306 U. S. 635; *United States v. Marcus*, 53 Fed.

784, 786 (C. C. S. D. N. Y.), error dismissed, 159 U. S. 259.

But, if such proof were necessary, the evidence that Weiss gave orders to the warehouse, that Goldsmith directed payment of the sight drafts for the whiskey, that all sales cleared through Francisco, that Francisco gave invoices for such sales, that Francisco received less than the ceiling price, and had never before handled the whiskey, all tended to show the participation of these defendants in the conspiracy. In order to render the corroborating evidence sufficient, it is not necessary even that the *corpus delicti* be proved beyond a reasonable doubt. *United States v. Di Orio*; *United States v. Kertess, supra*. Certainly it is not necessary that the exact manner of the participation by a defendant be proved in full detail without his admissions.

IV

THE INDICTMENT WAS PROPERLY LAID UNDER SECTION 37 OF THE CRIMINAL CODE

Petitioners contend that a prosecution for conspiracy to violate the Emergency Price Control Act by selling at over-ceiling prices will not lie under Section 37 of the Criminal Code, but must be brought under Sections 4 (a) and 205 (b) of the Emergency Price Control Act, making it an offense for any person to "sell or deliver" or for a person in the course of business to buy any commodity in violation of a price regulation, or to

"offer, solicit, attempt, or agree" to perform such Act. They argue that "agree," as used in Section 4 (a) covers the crime of conspiracy.

Since each of the petitioners was sentenced to less than the maximum fixed by Section 205 (b) of the Emergency Price Control Act, their argument in this respect, even if it were correct, is immaterial. At most, it amounts merely to a contention that the indictment cites the wrong statute, an insubstantial error. Rule 7 (c), F. R. Crim. P.; *United States v. Hutcheson*, 312 U. S. 219, 229; *Williams v. United States*, 168 U. S. 382, 389. Certainly, petitioners cannot claim prejudice because the prosecution undertook to prove overt acts which it would not have been required to plead if Section 4 (a) of the Emergency Price Control Act covered the crime of conspiracy.

In any event, we think it is clear that the term "agree" as used in Section 4 (a) of the Emergency Price Control Act does not cover the crime of conspiracy. When read in its context, "offer, solicit, attempt, or agree," it seems manifest that "agree" is used in the sense of promise, and was intended to cover the situation of a seller who promises, agrees, to sell, or a buyer for trade or business who promises, agrees, to buy at over-ceiling prices. All the words which precede "agree" relate to acts which can be performed by an individual alone, and since "agree" can, without distorting its meaning, be read to cover in-

dividual action, it should be so construed under the rule of *ejusdem generis*.

Repeals by implication are not favored. *United States v. Gilliland*, 312 U. S. 86, 96; *United States v. Borden Co.*, 308 U. S. 188, 198. When Congress has desired to make a conspiracy to commit a particular offense punishable under a separate statute, rather than under the general conspiracy clause, it has used apt words for such purpose, such as "conspiracy" or "conspire."¹⁰

That Congress contemplated that prosecutions for conspiracies would be brought under the general statute, rather than under the Emergency Price Control Act is shown by its amendment of Section 204 (e) of the Act to provide that the

¹⁰ Section 1 of the Sherman Antitrust Act of July 2, 1890, c. 647, 26 Stat. 209 (15 U. S. C. 1); Section 73 of the Act of August 27, 1894, c. 349, 28 Stat. 570, as amended (15 U. S. C. 8); Section 15 of the Act of March 20, 1933, c. 3, 48 Stat. 11 (38 U. S. C. 715); Section 21 of the Tennessee Valley Authority Act of May 18, 1933, c. 32, 48 Stat. 68 (16 U. S. C. 831t (c)); Section 64 of the Farm Credit Administration Act of June 16, 1933, c. 98, 48 Stat. 269, as amended (12 U. S. C. 1138d (f)); Section 4 of the Espionage Act of June 15, 1917, c. 30, 40 Stat. 217, 219, as amended (50 U. S. C. 34); Title VIII, section 5 of the Act of June 15, 1917, c. 30, 40 Stat. 226 (22 U. S. C. 234); Section 2 (a) of the Anti-Racketeering Act of June 18, 1934, c. 569, 48 Stat. 979 (18 U. S. C. 420a); Section 7 of the National Stolen Property Act, as amended by the Act of August 3, 1939, c. 413, 53 Stat. 1179 (18 U. S. C. 418a); Section 11 of the Selective Training and Service Act of 1940, c. 720, 54 Stat. 885, 894-895 (50 U. S. C. App. 311); Sections 19, 21, 35, 136, 296 of the Criminal Code (18 U. S. C. 51, 54, 83, 242, 487).

stays of criminal proceedings authorized by that section could be issued in prosecutions brought under Section 37 of the Criminal Code. Section 6 of the Joint Resolution of June 30, 1945, 59 Stat. 306, 308, App., *infra*, pp. 55-58. The conference report on that amendment (H. Rep. No. 827, 79th Cong., 1st sess., pp. 7-8) refers to the decision of the Emergency Court of Appeals in *Taub v. Bowles*, 149 F. 2d 817, certiorari denied, 326 U. S. 732, which held that a conspiracy to violate the Act was properly brought under Section 37 but that defendants in such prosecutions could not avail themselves of the remedy afforded by Section 204e. It then goes on to state:

Section 6 of the conference substitute makes the amendments in such subsection (e) which are necessary to give to persons prosecuted under section 37 of the Criminal Code, on account of alleged conspiracy to violate any such regulation or order, the rights provided by subsection (e) in the case of civil or criminal proceedings brought under section 205 of the act.

Clearly, therefore, Section 4 (a) was not intended to constitute a repeal pro tanto of Section 37 of the Criminal Code.

Petitioner Feigenbaum also argues (Pet. 57-59) that a conspiracy to sell at overceiling prices falls within the "concert of action" rule barring prosecution for conspiracy "where the agreement of two persons is necessary for the completion

of the substantive crime and there is no ingredient in the conspiracy which is not present in the completed crime," *Pinkerton v. United States*, — 328 U. S. 640, 643. This contention is conclusively answered by the opinion of Judge Dobie in *Old Monastery Co. v. United States*, 147 F. 2d 905 (C. C. A. 4), certiorari denied, 326 U. S. 734. As that opinion points out, the doctrine on which petitioner relies would at best apply to an attempt to charge a conspiracy between the buyer and the seller alone (see *United States v. Katz*, 271 U. S. 354, 355). Here no buyers were charged with conspiracy.

CONCLUSION

The evidence amply supports the jury's verdict that all the petitioners participated in a single conspiracy to sell liquor at overceiling prices. We therefore respectfully submit that the judgment of the court below should be affirmed:

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OCTOBER 1947.

APPENDIX

Section 37 of the Criminal Code (18 U. S. C. 88) reads as follows:

If two or more persons conspire either to commit any offense against the United States, or to defraud the United States in any manner or for any purpose, and one or more of such parties do any act to effect the object of the conspiracy, each of the parties to such conspiracy shall be fined not more than \$10,000, or imprisoned not more than two years, or both.

The pertinent provisions of the Emergency Price Control Act, 56 Stat. 23, 58 Stat. 632, 59 Stat. 306, 50 U. S. C. App., Supp. V, 901 *et seq.* are:

SEC. 4. (a) It shall be unlawful, regardless of any contract, agreement, lease, or other obligation heretofore or hereafter entered into, for any person to sell or deliver any commodity, or in the course of trade or business to buy or receive any commodity, or to demand or receive any rent for any defense-area housing accommodations, or otherwise to do or omit to do any act, in violation of any regulation or order under section 2, or of any price schedule effective in accordance with the provisions of section 206, or of any regulation, order, or requirement under section 202 (b) or section 205 (f), or to offer, solicit, attempt, or agree to do any of the foregoing.

SEC. 204. (e) (1) Within thirty days after arraignment, or such additional time as

the court may allow for good cause shown, in any criminal proceeding, and within five days after judgment in any civil or criminal proceeding, brought pursuant to section 205 of this Act or section 37 of the Criminal Code,* involving alleged violation of any provision of any regulation or order issued under section 2 or of any price schedule effective in accordance with the provisions of section 206, the defendant may apply to the court in which the proceeding is pending for leave to file in the Emergency Court of Appeals a complaint against the Administrator setting forth objections to the validity of any provision which the defendant is alleged to have violated or conspired to violate.* The court in which the proceeding is pending shall grant such leave with respect to any objection which it finds is made in good faith and with respect to which it finds there is reasonable and substantial excuse for the defendant's failure to present such objection in a protest filed in accordance with section 203 (a). Upon the filing of a complaint pursuant to and within thirty days from the granting of such leave, the Emergency Court of Appeals shall have jurisdiction to enjoin or set aside in whole or in part the provision of the regulation, order, or price schedule complained of or to dismiss the complaint. The court may authorize the introduction of evidence, either to the Administrator or directly to the court, in accordance with subsection (a) of this section. The provisions of subsections (b), (c), and (d) of this section shall be appli-

*Added by sec. 6 of Joint Resolution of June 30, 1945,
59 Stat. 306, 308.

cable with respect to any proceeding instituted in accordance with this subsection.

(2) In any proceeding brought pursuant to section 205 of this Act or section 37 of the Criminal Code,* involving an alleged violation of any provision of any such regulation, order or price schedule, the court shall stay the proceeding—

(i) during the period within which a complaint may be filed in the Emergency Court of Appeals pursuant to leave granted under paragraph (1) of this subsection with respect to such provision;

(ii) during the pendency of any protest properly filed by the defendant under section 203 prior to the institution of the proceeding under section 205 of this Act or section 37 of the Criminal Code,* setting forth objections to the validity of such provision which the court finds to have been made in good faith; and

(iii) during the pendency of any judicial proceeding instituted by the defendant under this section with respect to such protest or instituted by the defendant under paragraph (1) of this subsection with respect to such provision, and until the expiration of the time allowed in this section for the taking of further proceedings with respect thereto.

Notwithstanding the provisions of this paragraph, stays shall be granted thereunder in civil proceedings only after judgment and upon application made within five days after judgment. Notwithstanding the provisions of this paragraph, in the case of a proceeding under section 205 (a) the

*Added by sec. 6 of Joint Resolution of June 30, 1945, 59 Stat. 306, 308.

court granting a stay under this paragraph shall issue a temporary injunction or restraining order, enjoining or restraining, during the period of the stay, violations by the defendant of any provision of the regulation, order, or price schedule involved in the proceeding. If any provision of a regulation, order, or price schedule is determined to be invalid by judgment of the Emergency Court of Appeals which has become effective in accordance with section 204 (b), any proceeding pending in any court shall be dismissed, and any judgment in such proceeding vacated, to the extent that such proceeding or judgment is based upon violation of such provision. Except as provided in this subsection, the pendency of any protest under section 203, or judicial proceeding under this section, shall not be grounds for staying any proceeding brought pursuant to section 205 of this Act or section 37, of the Criminal Code;* nor, except as provided in this subsection, shall any retroactive effect be given to any judgment setting aside a provision of a regulation or order issued under section 2 or of a price schedule effective in accordance with the provisions of section 206.

SEC. 205. (b) Any person who willfully violates any provision of section 4 of this Act * * * shall, upon conviction thereof, be subject to a fine of not more than \$5,000, or to imprisonment for not more than two years in the case of a violation of Section 4 (c) [relating to the disclosure or use for personal benefit of official information by government officers]

*Added by sec. 6 of Joint Resolution of June 30, 1946, 59 Stat. 306, 308..

and for not more than one year in all other cases, or to both such fine and imprisonment.

Section 24.4 of the California Alcoholic Beverage Control Act, 2 California, *General Laws* (Deering 1944), Act 3796, provides:

Records to be kept by retailers of spirits. On-or off-sale distilled spirits licensees shall keep books of accounts in which shall be kept records of all distilled spirits acquired by such licensees, or in lieu thereof shall preserve all original bills and invoices for distilled spirits acquired. Such records shall be in the form prescribed by the board and shall show at all times all purchases of distilled spirits made during the previous two years.

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In the Supreme Court of the United States

OCTOBER TERM, 1947

No. 55

LAWRENCE B. GOLDSMITH,

Petitioner,

vs.

THE UNITED STATES OF AMERICA.

Petition of Lawrence B. Goldsmith for Rehearing

*To the Honorable the Chief Justice of the United States
and to the Honorable the Associate Justices of the
Supreme Court of the United States:*

Your petitioner, Lawrence B. Goldsmith, respectfully prays that a rehearing be granted as to him. In support of his prayer your petitioner respectfully shows:¹

1. Quoted matter is from the Court's opinion, unless otherwise indicated.

This petition considers only the aspects of the case which affect petitioner. The filing of a petition for rehearing in a matter which has resolved itself into a determination of what inferences are *legally* permissible,²—not only what inferences “a rational, well constructed mind can reasonably draw” (*Jannin v. London etc. Bank*, 92 Cal. 14, 27), but as well what inferences a jury is to be permitted to draw in the light of the Government’s burden of proof² and the presumptions, notably that of innocence, to be overcome,—is approached with diffidence. The matter is usually one of sound judgment.⁰ Normally, no mechanical yardstick gives the measure by which it can be said that the presumption of innocence has, or has not, fairly been overcome. Realization of the difficulty, at this stage of the case, might dictate submission to the Court’s judgment were it not that there are contrary considerations which seem compelling,—at least to advocates who have tried to disassociate themselves from the prepossessions with which they went into defense of the case.

The short of our position is that the judgment has permitted itself to be overwhelmed by inadmissible admissions,—inadmissible because without fair foundation; that these admissions have been permitted to have anticipatory effect and to give persuasiveness to the argument for such foundation to the point, in practical effect, of supplying it, although, until that foundation was firmly set on its own bottom, the admissions were not entitled to any consideration. It is submitted, with deference, that the admissions have worked the improper influence that the Court recog-

2. Cf. *Patton v. Texas & P. R. Co.*, 179 U.S. 658, 45 Led. 361; *Penn. R. Co. v. Chamberlain*, 288 U.S. 333, 77 Led. 819; *Mortensen v. United States*, 322 U.S. 369, 374, 88 Led. 1331, 1335.

nizes is a danger with fallible jurors; that the opinion has not shaken their effect when considering,³ as to Goldsmith, the basic question whether independently of the admissions there was proof of the *corpus delicti*,—as to Goldsmith, his connection with a conspiracy, real or supposed.⁴

Concededly, as to Goldsmith, there are only two circumstances to support what is, with a deference, the pyramiding of inference upon inference in the face of the rule that a conviction must be taken beyond the realm of guess, speculation and reasonable doubt. The opinion recites the objective aspects of Goldsmith's transaction from the ordering and receipt of the whisky, payment for it, sale of it and receipt by Francisco of \$24.50 per case, its selling price, and says: "Thus far no illegal act, transaction, intent or agreement appears." Indeed, the government, and the opinion, strain to make some virtue of this by arguing the regularity of Goldsmith's objective conduct against him; by arguing that the "innocent appearing actions" of Goldsmith "were the crux of the conspiracy"! To this are then added two major circumstances: (1) admissions that Francisco did not own the whisky,⁵ taken to show something sinister and (2) over-arching transactions with the whisky by three men though "the evidence does not show that any of these last three

3. Not expressly, of course. But the use of the admissions presupposes such consideration.

4. As to *him* the *corpus delicti* is a conspiracy to which *he* was a party, not some different conspiracy. In conspiracy the connection is the gist of the offense. *Morrison v. California*, 291 U.S. 82, 92, 78 L.ed. 664, 671.

5. We assume, for purpose of endeavoring to meet the opinion, that they go this far.

was connected with Francisco in any way except that each had part in arranging sales and deliveries of" some of the whisky, taken to supply the precise sinister purpose and agreement required for criminal conspiracy.⁶

The opinion abundantly demonstrates the force of the claimed admissions, if they can be considered. Not only in the order of steps taken are they first used to show that Goldsmith was not the owner of the whisky and therefore must have been a party to some unholy alliance, without which there was no improper scheme for anyone to join, but the opinion itself characterizes them. They are said to be "important admissions" which "give rise to the crucial problems in the case"; they **"alone disclose the unknown owner's existence"**; that Goldsmith and Weiss were acting for him, not for themselves; * * *; and gave the use of Francisco's name to cover up the unknown owner's existence, identity and part in the scheme"; "they supply strong confirmatory or supplementing proof to show, not only the connection of Goldsmith and Weiss with the scheme, but also its existence and illegal character"; their effect was such that if improperly received as to the other defendants "reversal would be required" because even if the evidence was sufficient without them "they were of such importance that if admitted improperly the jury might have drawn entirely different inferences from the whole evidence including them than from it without them." Even in the result reached the opinion concedes

6. *Wong Tai v. United States*, 273 U.S. 77, 81, 71 L.ed. 545, 548.

7. An essential of the corpus delicti, on the Government's theory, and here conceded to be without independent proof or corroboration.

that without them the evidence as to Goldsmith "becomes not so compelling." Their effect was such that even when admitted as to two defendants only, and with the jury carefully instructed they could not be used against the other defendants, there was danger that the jury "would transfer, consciously or unconsciously," their effect to the other defendants. "That danger was real." If there was danger that the other defendants would be overwhelmed by the admissions it was, of necessity, greater as to Goldsmith. Although not entitled to be considered against him until otherwise a case was made, the admissions, except by the exercise of the utmost judicial restraint, were bound, and, with deference, were permitted; unconsciously to color circumstances otherwise neutral.

No question is made of the rule that admissions were not entitled to be received or considered against Goldsmith until without them a case against him fairly had been made. (*Warszower v. United States*, 312 U.S. 342, 85 L.ed. 876; *Isaacs v. United States*, 159 U.S. 487, 40 L.ed. 229; *Tabor v. United States*, 152 F.2d 254, 257 (C.C.A. 4); *Forte v. United States*, 68 App. D.C. 111, 94 F.2d 236.) No statement by Goldsmith or in his presence was part of any transaction under consideration,—was part of the *res gestae*. The admissions were "not made in execution of the common design, * * * some of them because made after termination of the conspiracy, others because they had no effect to forward its object. None were made in furtherance of the conspiracy's object."

The Government's case as to its sufficiency against Goldsmith (though not, perhaps, as to its persuasiveness if otherwise sufficient) must rest on the same evidence as the

case against the other defendants, considered in Part III of the Opinion. In this aspect it is a case of a wholesaler selling his own whisky.

In this aspect **Francisco** bought, received and paid for whisky, **sold its own whisky** and received its sales price for the whisky, "no illegal act, transaction, intent or agreement" appearing, other than that persons "not shown" to be "connected with Francisco in any way," except that they arranged sales of this whisky, received side payments which brought the purchaser's price over the ceiling.⁸ "It was not brought out with what person or persons" these persons dealt in securing the whisky and it is not shown that they had any direct dealing with Francisco or Goldsmith. To this there is one exception. Figone testified that he went to Francisco's place of business, but the opinion somewhat understates the evidence when it says that he "could not identify the person with whom he dealt." His evidence went beyond this. It was, affirmatively, that the person **was not Goldsmith**. The evidence did not show that Francisco received anything beyond its sales price of \$24.50.⁹

What, then, is the basis for an inference of guilt of conspiracy as to Goldsmith, the admissions, thus far inadmissible, aside? With deference, by a process of cutting and patching a series of minor circumstances are used in the attempt to show that Goldsmith, selling his own whisky, must have known that there was some intermediary who was receiving something, that the difference

8. See text at note 7 above.

9. This is in effect conceded when it is said that "it was a matter of indifferent detail to the salesmen . . . that Goldsmith and Weiss were receiving and splitting only the \$2 per case."

between \$24.50 per case and the ceiling was so small that he must have known this something would bring the purchaser's price above the ceiling, and that unless this were the situation he would not have sold below the ceiling.

The last circumstance is colorless. If Goldsmith did know someone was receiving payment beyond his sales price and that it must bring the purchaser's price above the ceiling, this was no reason for *him* to sell his whisky *below* the ceiling. If the tavern owner was to pay more than the ceiling price there was every reason why Goldsmith should sell up to the ceiling. In fact he did sell 2465 cases below the ceiling with no side payment to anyone! The real reason he sold below the ceiling was that the ceiling varied. It depended on three factors, one of which was a variable, the freight. The ceiling was arrived at by applying a formula. It was 115% of the distiller's price, plus freight, plus state tax. It is assumed that the ceiling was the same for all of the whisky. It was not. If the exhibits in this Court (the freight bills) are examined it will be found that *the freight per case was not the same for each of the two cars and that the ceiling was not the same for both carloads of whisky*. This whisky was contracted to be sold, as the opinion points out, before it arrived in San Francisco and before Goldsmith could know what the freight was. At best he could only estimate the ceiling and prudently fixed his price safely within it.

Aside from the admissions, the case against Goldsmith is made to turn upon the proposition that he and Weiss "knew the margin of legal profit left, whether for themselves or for others, after deducting the \$24.50 per case

was only 77¢." But the opinion neglects to point out, with deference it can not be pointed out, how it can be inferred fairly that they knew anyone else was to receive a profit, unless the admissions are considered. There is nothing to indicate that they knew there were any intermediaries between them and the tavern owners or that if there were an intermediary he was acting for money rather than as an accommodation and from entirely proper motives. To the contrary, there is a compelling circumstance that points to want of such knowledge. This, it is believed, the Court has not given proper effect, although it has noticed it.¹⁰

The total of the two shipments of whisky ordered, received, paid for and disposed of by Francisco was 4040 cases. Of these 1575 at the most were shown to have been paid for by tavern owners at a price over the ceiling.¹⁰ The exhibits in this case will show that Francisco reported to the Government, on forms required by the Government, the name and address of the receiver of each of the other 2465 cases. Those buyers were all located within the general San Francisco Bay Area; at places not as far distant as Cottonwood, from which Taylor and Humes came. As to sale of these 2465 cases no proof of illegality was made. Are we wrong in believing that the presumption of innocence, and the rule placing on the government the burden of proving what it intends to claim, operate to compel the conclusion that Goldsmith's dealings with these 2465 cases were entirely legitimate; that as to each of the 2465 there was no intermediary, or if there were an intermediary, there was none exacting side payment?

10. See note 1 of the opinion.

Goldsmith cannot be saddled with an inference that, he knew that there was any payment for these 2465 cases, beyond the payment made to Francisco, **for there was none**. But if the inference cannot be drawn here it is not warranted as to the 1575. There is not a shred of evidence that **so far as Goldsmith was concerned** the dealings with the 1575 differed in any particular from the dealings with the 2465.¹¹ Yet, it is concluded that "innocent appearing actions" in acquiring and disposing of 4040 cases of whisky, exactly the same, so far as Goldsmith acted, for all of the 4040, and innocent in fact as to 2465, warrant an inference of his participation in a conspiracy to sell this whisky over the ceiling because it later develops that 1575 of the 4040 were illegally dealt with by others, but with no more proof of Goldsmith's knowledge of the illegality than that all 4040 cases were handled by him in the same way,—by "innocent appearing actions"!

This is the significance of the fact that Goldsmith handled not 1575 cases but 4040 cases, all in exactly the same way: It precludes any sinister inference from the fact that Francisco sold at \$24.50, below the assumed ceiling by 77¢ (see above). If this was all Francisco got for 2465 cases properly sold, what possible motive would Goldsmith have for "sticking his neck out" for no more, on improper sales when he could sell legitimately and easily in a time of shortage? The sale of the 2465 at \$24.50 disposes of the suggestion (note 13 of the opinion) that it could be inferred that Francisco was "willing to make sales only because of an illegal agreement with the sales-

11. The same in every sense,—not merely in time, place and character, but the very same.

men to receive over-ceiling prices." And if it got only \$2.53 profit per case in any event (see note 9 above) it had no interest in any "salesmen" or their existence. And where, **as to Goldsmith**, no more appears touching the 1575 that appears as to the 2465, the suggestion (opinion, note 13) that an inference of misconduct can be drawn because dealings were with "salesmen" with whom no prior dealings had been had and who were not regularly in the liquor business evaporates for there is no basis for an inference that Goldsmith knew anything about *any* "salesman,"—knew even of his existence.

We submit, with deference, that it is a startling result to hold that a series of objective acts, the **same**¹¹ for two, series of transactions, one of which is legal beyond question, without more warrants the conclusion that the actor's part in the second series was criminal. If the conclusion is not warranted the showing is without more because the claimed admissions can not be considered.

These are the reasons which have impelled us to ask reconsideration for Goldsmith:

1. The admissions which have colored this whole case are entitled to no probative value, indeed, were not entitled to be received in evidence, until independently a case had been made against Goldsmith.

2. The circumstances said to warrant an inference, without regard for the admissions, that Goldsmith was a party to a conspiracy to sell whisky over the ceiling are exactly the same as to Goldsmith with respect to 2465 cases of the same whisky legitimately sold by him.

We respectfully submit that Goldsmith is entitled to the benefits of the rule of *United States v. Falcone*, 311 U.S.

205, 25 L.ed. 128. He was not required to accompany every case of whisky to its place of final rest behind a bar and to police its journey.

It is respectfully submitted that the cause, as to petitioner Goldsmith, warrants reconsideration.

Dated at San Francisco, California, January 9, 1948.

ARTHUR B. DUNNE,

WALTER H. DUANE,

*Attorneys for Petitioner
Lawrence B. Goldsmith.*

CERTIFICATE

The undersigned, counsel for petitioner Lawrence B. Goldsmith, certify that the foregoing petition for rehearing is presented in good faith and not for delay.

ARTHUR B. DUNNE,

*Attorney for Petitioner
Lawrence B. Goldsmith.*

FILE COPY

In the Supreme Court of the United States

OCTOBER TERM 1947

No. 56

SAMUEL S. WEISS,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

Petition for a Rehearing

SAMUEL S. WEISS,

P. O. Box 127, Ambassador Station,
Los Angeles, California.

Petitioner in propria persona.

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In the Supreme Court of the United States

OCTOBER TERM 1947

No. 56

SAMUEL S. WEISS,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

Petition for a Rehearing

To Honorable Fred M. Vinson, Chief Justice of the United States, and to the Honorable Associate Justices of the Supreme Court of the United States:

Your petitioner, Samuel S. Weiss, respectfully prays your Honors for a rehearing of this cause, submitting that in affirming the judgment of the Circuit Court of Appeals which affirmed the conviction of your petitioner and three

others in the District Court for the Northern District of California, this high court has misconceived the facts, has misapplied the law, and has condoned numerous and egregious errors committed by the trial judge.

It is submitted that there is an irreconcilable conflict between the opinion of Mr. Justice Rutledge in the case at bar and his earlier opinion on the same subject (the sufficiency of the evidence to establish a conspiracy) in *Kotteakos v. United States*, 328 U.S. 750, 66 S. Ct. 1239, 90 L.ed. 1557.

More specifically the grounds now urged by your petitioner for a rehearing may be stated as follows:

**GROUND UPON WHICH PETITIONER CONTENTS THAT
A REHEARING SHOULD BE GRANTED.**

1. That the opinion of this Honorable Court, in the face of *Kotteakos v. United States, supra*, has held the evidence sufficient to show the existence of a conspiracy, though there is not a shred of evidence of collusion, agreement, understanding or even acquaintance among the alleged conspirators;

2. That the Record, as far as petitioner Weiss is concerned, not only fails to show that he was a party to any conspiracy but, likewise, fails to show that he committed any offense whatever. The Record leaves him precisely where he was before the commencement of the trial and before the presentment of the indictment, presumed by law to be innocent of any crime or wrongdoing, with no evidence to dispel that presumption, indeed, without any evidence to even raise a reasonable suspicion of guilt;

3. That this Honorable Court by drawing, not upon the Record, but upon the imagination, and by the employment of its sheer *ipse dixit* and not otherwise, has evolved a new theory to uphold the conviction of this petitioner and his co-defendants, and has created a land of fanciful events and the fantasmagoria of a legalistic dream;

4. That the Opinion states as proved facts, matters neither shown by any direct testimony in the Record nor inferentially deducible therefrom. Indeed, the Opinion repeatedly states as facts, matters established by no evidence, either oral or documentary, and which have no existence save in the elastic imaginations of counsel for the Government;

5. That this Honorable Court has erroneously decided that, although the violation of a regulation of the sometime extinguished late and unlamented Administrator of the Office of Price Administration or an agreement (the equivalent of a conspiracy to violate such Regulation), is a mere misdemeanor under the express provisions of the Act itself, a conspiracy to violate one of the multitudinous Regulations adopted was a felony;

6. Aside from the question of the sufficiency of the evidence to show a conspiracy, this point is the only one decided in the Opinion of this Honorable Court.

Since, as stated in the second paragraph of the Opinion of Mr. Justice Rutledge, the grant of *Certiorari* was not limited to the question of the application of *Kotteakos v. United States, supra*, petitioner states as additional ground for a rehearing, that this Honorable Court has failed to

consider or discuss, and has not even mentioned the following questions raised in the brief of petitioner, each of which presents a question whose importance can scarcely be overstated:

(a) That the indictment does not charge any crime or conspiracy to commit any crime against the United States;

(b) That the Maximum Price Regulations which the indictment alleges the defendants conspired to violate, are void for uncertainty, and that the conviction of petitioner is, therefore, a violation of the provisions of the Fifth Amendment to the *Constitution of the United States* that no person shall be deprived of life, liberty or property without due process of law;

(c) That the District Court erred in denying the motion of petitioner for an instructed verdict of not guilty;

(d) That the District Court erred in denying the motion of petitioner Weiss in arrest of judgment;

(e) That the conviction of petitioner is a violation of Article I, section 9, Clause 3 of the Constitution of the United States, which provides: "That no bill of attainder or *ex post facto* law shall be passed".

(f) That the District Court erred in admitting against petitioner Weiss, testimony and documents relating to the other defendants without any proof whatever tending to connect Weiss with any of the transactions testified to by such witnesses, or with any conspiracy;

(g) That the Government failed to prove the maximum price for which the brand of whiskey mentioned

in the indictment might be sold and the Trial Judge committed reversible error in instructing the jury as to the maximum price;

(h) That the now defunct Emergency Price Control Act was unconstitutional and void, and that prior decisions upholding its unconstitutionality, such as *Yakas v. United States*, 321 U.S. 414, have been partly overruled by later decisions of this court, and should be overruled *in toto*.

We repeat, and most respectfully submit that there is no justification for the action of this Honorable Court in refusing to consider and decide the foregoing questions, all of which involve the liberty of citizens of the United States and as to each of which a decision adverse to the contention of petitioner strikes deep at the very roots of free and constitutional government.

ARGUMENT

- I. THIS HONORABLE COURT HAS ERRONEOUSLY HELD THAT
- (1) THERE IS SUFFICIENT PROOF OF A CONSPIRACY;
 - AND (2) THAT THE EVIDENCE ESTABLISHES THE CONNECTION OF PETITIONER WEISS WITH SUCH CONSPIRACY.

In the Briefs on file for this petitioner and three of his co-defendants; it was argued at very great length and with citation of many authorities including one decision written by the learned author of the Opinion in the case at bar (*Kottakos v. United States, supra*), that the evidence in the Record showed at most that the appellants Blumenthal, Feigenbaum and Abel engaged in black market operations in that particular brand of whiskey men-

tioned in the indictment. There is not one iota of evidence in the Record that Blumenthal, Abel and Feigenbaum entered into any agreement with each other to sell the whiskey, that they ever subscribed to the *modus operandi* that was used in its sale or, indeed, that any of these three defendants knew either of the other two or that any defendant knew that the other defendants were making sales of the whiskey for more than the alleged ceiling price of the same. We use the word "alleged", advisedly because as we shall presently point out there was no evidence in the Record that any ceiling price was ever fixed. As was well shown in the learned dissenting opinion of Judge Denman in the Circuit Court of Appeals referring to the opinion of the majority of the court and citing *Kotteakos v. United States, supra*:

"The statement of facts of the court's opinion has a fatal vacuum necessary to be filled to establish the conspiracy charged, though its circumstantial evidence warrants the inference of at least four other disconnected criminal conspiracies.

Abel, Blumenthal and Feigenbaum are shown to have been black marketeers and should have been prosecuted for selling whiskey at over ceiling prices. Instead, the several prosecutions are sought to be avoided by attempting to throw a conspiracy net around them—a convenience to prosecutors but often dangerous to the cause of justice. Cf. *Kotteakos v. United States*, 328 U.S., 90 L.ed. 1178, 1183."

Referring to the appellants Weiss and Goldsmith, Judge Denman used the following language:

"The same is true also of the appellants Weiss and Goldsmith. The conspiracy charged is that they

conspired with the three black marketeers, Abel, Blumenthal and Feigenbaum to sell whiskey at higher than the maximum price. The court's opinion states no facts and the record has none showing that either Weiss or Goldsmith knew that any whiskey was sold at such higher prices, much less than there was any agreement with the three or any one of them for such prohibited sales.

There is evidence that Weiss and Goldsmith received \$2.00 per case to pass the whiskey through their books and to sell it at slightly less than the maximum price to cover up some unknown reason of the unknown owner. But this is fully capable of supporting an inference that the unknown owner has highjacked the whiskey and wanted it sold at something slightly less than the maximum so that no question could be raised regarding its disposition. True this would be a wrongful conspiracy, but as in the *Kotteakos* case, not the conspiracy charged in the instant indictment."

The opinion of Mr. Justice Rutledge contains no answer to the foregoing clear and unanswerable statements of Judge Denman.

All this, of course, was argued at length in the Briefs separately filed in the Circuit Court of Appeals by the five defendants and was also presented with quotation from the foregoing language of Judge Denman in the petition filed in this court for *Writ of Certiorari*.

Does the learned Justice, who wrote this opinion, attempt to distinguish it from his own well written Opinion in the *Kotteakos* case? Certain statements as to the sufficiency of the evidence are made in the Opinion. We shall briefly refer to each of them.

(a) In the second paragraph of the Opinion, it is stated: "The competent proof was clearly sufficient to show that each petitioner had aided in the whiskey's illegal sale **and had conspired with others to do so.**" This is a mere assumption of the hypothesis. It is no more than the *ipse dixit* of the learned Justice. It is the easiest way of disposing of a judicial question but is by no means the most satisfactory or the most convincing.

It is demonstrably true that the affirmation of the conviction of this petitioner is based solely upon evidence which was, concededly, inadmissible against any defendant except the one against whom it was admitted, because it consisted merely of some alleged declarations of petitioner Weiss and his co-defendant Goldsmith, after the fruition of the alleged conspiracy. Since one cannot conspire with himself alone, and since it is necessary to prove the unlawful agreement of two or more persons, it follows that any declaration of petitioner Weiss, incompetent to prove participation by anyone but himself, failed, therefore, to prove that two or more persons conspired.

But that is not the only vice of the Harkins' testimony, upon which the Opinion leans most heavily. No rule of law is better settled than the rule that the *corpus delicti* in a criminal case, which in a prosecution for conspiracy is the conspiracy itself, cannot be proven by the extrajudicial admissions, or even confessions of the accused without proof *aliunde* of the *corpus delicti*. It is elementary Horn Book Law—a principle apparently overlooked—by this Honorable Court, that the declarations of the accused are, of themselves, insufficient, to prove the body of the offense. To the point that the proof, in order

to sustain a conviction for conspiracy, must show participation of more than one person; see:

People v. MacMullen, 134 Cal. App. 81;

Dawson v. United States (C.C.A. 9th), 10 Fed.(2d) 106;

People v. Miller, 82 Cal. 107; 22 Pac. 934;

People v. Richards, 67 Cal. 412; 7 Pac. 828;

Merrill v. Marshall, 113 Ill. App. 447;

State v. Clark (Del.), 33 Atl. 310.

That the *corpus delicti* in a conspiracy case is the conspiracy itself, see:

Wyatt v. United States, 23 Fed.(2d) 791;

Langer v. United States, 76 Fed.(2d) 817;

Shannaburger v. United States, 99 Fed.(2d) 957;

Cartello v. United States, 92 Fed.(2d) 412;

Dahley v. United States, 50 Fed.(2d) 37.

In *Young v. United States*, 48 Fed.(2d) 26, a conviction of conspiracy was reversed because **there was no evidence** that the defendants "were acting in concert; for all that appears, each was acting only for himself." Unless and until it is established by the evidence that a conspiracy had been formed, and that the defendant was a member thereof, no act or declaration of an alleged co-conspirator is admissible in evidence against him. To use the language of the late Justice Richards in *People v. MacPhee*, 26 Cal. App. 218, 224; 146 Pac. 522:

"Such proof cannot consist merely in the acts and declarations of the alleged co-conspirators but must be in the nature of an independent showing as to the existence of the conspiracy."

The Opinion of Mr. Justice Rutledge concedes that the evidence does not show that Blumenthal, Abel or Feigenbaum was connected in any way with the Francisco Distributing Co., and further concedes that up to the time that the Francisco Distributing Co. received from the tavern keepers, who purchased the whiskey, the sum of \$24.50 per case "no illegal act, transaction, intent or agreement appears." The opinion then goes on to state that in addition to paying the Francisco the ceiling price of the whiskey, an additional sum was paid by the purchasers in cash to Blumenthal, Feigenbaum, Abel and several other "mysterious" salesmen. From these facts, this Honorable Court has drawn the inference or rather the assumption that the petitioner Weiss, who was nothing more than an employee of the Francisco and who attended to certain clerical routine matters relative to the drafts, invoices and bills of lading of the whiskey, knew that the three defendants who are grouped together in the Opinion as one of "two groups of defendants," were charging purchasers of the whiskey large sums in addition to the ceiling price which was remitted directly to the Francisco Distributing Company, the name under which the defendant Goldsmith transacted business.

Now, as we pointed out at great length, and with prolific quotation from the Record, in the briefs heretofore filed, there is no evidence whatever in the Record, and certainly the Opinion quotes none, from which any inference could be drawn that petitioner Weiss had any knowledge whatever that Abel, Blumenthal, Feigenbaum or any one else who sold the whiskey received any part of the additional amounts paid to Feigenbaum or Goldsmith or

Abel. It is apparent from the Opinion of the Circuit Court of Appeal and from the Record on file that the case was tried in the lower court upon the theory that, because the defendants who sold the whiskey to various proprietors of bar rooms or taverns or restaurants procured the whiskey from a common source and, because each of them charged more than the Regulation allowed, there was sufficient evidence to let all the testimony in and to receive all the documents produced as evidence against all of the defendants. To state the matter otherwise—the Government at the trial sought to have the jury draw the inference that a conspiracy existed because of the similarity of methods employed in making the sales of the whiskey. The fallacy of such a theory is easily demonstrable. Persons who violate unpopular inexpedient law usually adopt similar methods of violation or evasion. Numerous illustrations might be given. Landlords who are not allowed to charge as much as they thought that their accommodations were worth, resorted to such methods as requiring a prospective tenant to pay a bonus in order to get accommodations. Such instances were numerous as were many other devices, in evading price controls. Yet, would any lawyer who valued his reputation for sanity contend that the landlords of the country who used similar or identical methods of evading the controls on rent, could be rounded up from the four quarters of the compass and tried *en masse*? (*Paddock v. United States*, 79 Fed.(2d) 872.) Indeed, the absurdity of the theory under which the defendants were convicted in the lower court was so palpable that it is now abandoned by the Government, and the Opinion of Mr. Justice Rutledge has evolved a new theory

upon which to sustain the conviction, a theory which may thus briefly be stated: That the whiskey did not belong to the Francisco Distributing Company at all but actually belonged to Blumenthal, Abel, Feigenbaum and, perhaps, others, that the checks for the ceiling price were made out to the Francisco, to lend the transactions a coating of legality and that the distributing company was what Mr. Justice Rutledge described as a mere facade. This, we submit, is the achievement of literary elegance at the expense of factual and legal accuracy. There is not a word of evidence in the Record to substantiate any such theory. There is no testimony that either the checks made out to the Francisco nor any of the proceeds thereof were ever "kicked back," if we may use a homely phrase, to any of the defendants who sold the whiskey to the tavern keepers. Now follow two instances of utter inconsistency in the opinion of the court which we confess our inability to understand: after the statement just referred to which intimates that the Francisco and thus, we are told, Goldsmith and Weiss, were not the owners of the whiskey (see p. 8 of the Opinion) the court proceeds to promulgate the theory that some unknown person not named as a defendant in the indictment was the true owner of the liquor. According to this theory, Goldsmith, Weiss, Feigenbaum, Abel and Blumenthal were the mere media through which this unknown and unidentified person effected the sales—in other words, "X," the unknown quantity, owned the liquor but he cannot be discovered or identified by any formula, either legal or algebraic. We submit that this theory is based upon no evidence whatsoever, is the veriest conjecture and the sheerest guess work. There is not even

the hint of the existence of such a person in the Record, and the defendants, in effect, are accused of conspiring with a ghost!

Accordingly, it is not strange that the learned author of the Opinion shifts his position only a paragraph or so later. It is stated in footnote 13 at p. 13 of the printed Opinion:

"The evidence as to the unknown owner no longer being in the picture, the inference is almost irresistible that Francisco was the owner. On arrival of the whiskey, title was taken in Francisco's name, in which the shipping documents were made out, sight drafts for the two carloads were paid at Goldsmith's direction from Francisco's bank account and the whiskey was stored and delivered by the Warehouse Company in accordance with Weiss' directions."

Thus, this Honorable Court, in order to sustain the conviction, has advanced three utterly inconsistent theories as to the ownership of the liquor:

First, that it was the property of Blumenthal, Abel, Feigenbaum and other persons, whose names are not set forth;

Second, that it was the property of the mysterious "X";

Third, that it was the property of the Francisco Distributing Company after all!

While we have the highest respect for this Honorable Court and the learned Justice who wrote the Opinion, we must confess to mental limitations that preclude us from following this reasoning. The truth is—and no other rational conclusion may be drawn from the Record—that the whiskey was the property of the Francisco Distributing Company, from which it was procured by the defendants,

Blumenthal, Abel and Feigenbaum, that the Francisco received no more than what the Government concedes was the legitimate ceiling price, and that any excess which was charged was charged by Blumenthal, Abel and Weiss, each acting independently of the Francisco, and of each other. Such evidence, obviously, does not sustain the theory of a conspiracy. See *Kotteakos v. United States*, *supra*.

II. THE PETITIONER WEISS STANDS IN THE RECORD AS AN INNOCENT PERSON IMPROPERLY INDICTED AND FALSELY ACCUSED.

The Honorable Justice who is the author of this Opinion has spoken of "two groups" of defendants. As a matter of fact, the defendants cannot be grouped. Blumenthal, Feigenbaum and Abel constitute a group only in the sense that they used like methods in disposing of the whiskey. Otherwise, each of them stands alone because of the utter dearth of evidence of any collusion or agreement between them or any knowledge on the part of any of them of the activities of the others. Goldsmith stands alone because his sole connection with the sales was that the whiskey belonged to him and he was paid for it in an amount under the alleged maximum price. Weiss not only stands alone, but any complicity or participation in any illegal activity is disproven by the record. As far as he is concerned, we have more than a case of failure of the Government to prove guilt; we have affirmative evidence of innocence. The indictment charged as one of the overt acts in furtherance of the conspiracy that Weiss made a sale of a quantity of the whiskey to one Figone. But, when Figone took the stand, there was a **debacle** of the

Government's case against Weiss, because Figone testified that Weiss did not make any sale of whiskey to him, that the man who sold to him was not Weiss. The same testimony was given by the witness Cermusco, who testified that he bought some whiskey from a man who gave his name as Weiss or Wise or "something," and further states, "I do not see the man that I saw then here in the courtroom. I have been here for a couple of days, since yesterday, and I have not seen him yet." Weiss at that time was seated at the counsel table, conducting his own defense.

It is obvious that the man who sold the liquor to these witnesses was not the defendant Weiss. That Weiss knew of any illegal activities of any of his co-defendants is not supported by even a shadow, much less by any substance, of proof. Indeed, even if Weiss had had knowledge of what some of his co-defendants were doing, the evidence would be insufficient to convict, because even knowledge of a conspiracy, without active participation therein, is insufficient.

Young v. United States, supra;

Tingle v. United States, supra;

State v. Naylor, 113 W.Va. 446; 168 S.E. 489;

Turcott v. United States, 21 Fed.(2d) 829;

Jianole v. United States, 299 Fed. 496;

Greenspahn v. United States, 298 Fed. 736;

Lucadamo v. United States, 280 Fed. 653.

In this connection, we respectfully call the attention of the court to certain language used by Mr. Justice Rutledge in the Opinion which is directly at variance with the views expressed by him in *Kotteakos v. United States, supra*.

At page 16 of the printed opinion, the learned justice says:

"The law does not demand proof of so much. For it is most often true, especially in broad schemes calling for the aid of many persons, that after discovery of enough to show clearly the essence of the scheme and the identity of a number participating, the identity and the fact of participation of others remain undiscoverable. Secrecy and concealment are essential features of successful conspiracy. The more completely they are achieved, the more successful the crime. Hence the law rightly gives room for allowing the conviction."

Compare this with the following language used by Justice Rutledge in the *Kotteakos* case, 90 L.ed., at p. 1572:

"We have not rested our decision particularly on the fact that the offense charged, and those proved, were conspiracies. That offense is perhaps not greatly different from others when the scheme charged is tight and the number involved small. But as it is broadened to include more and more, in varying degrees of attachment to the confederation, the possibilities for miscarriage of justice to particular individuals become greater and greater. Cf. *Gebardi v. United States*, 287 U.S. 112, 122, note 7, 77 L.ed. 206, 211, note 7, 53 S.Ct. 35, 84 A.L.R. 370, citing Report of the Attorney General (1925) 5, 6, setting out the recommendations of the Conference of Senior Circuit Judges with respect to conspiracy prosecutions. At the outskirts they are perhaps higher than in any other form of criminal trial our system affords. The greater looseness generally allowed for specifying the offense and its details, for receiving proof, and generally in the conduct of the trial, become magnified

as the numbers involved increase. Here, if anywhere, cf. *Bollenbach v. United States*, 326 U.S. 327, ante, 318, 66 S.Ct. 402, *supra*, extraordinary precaution is required not only that instructions shall not mislead, but that they shall scrupulously safeguard each defendant individually, as far as possible, from loss of identity in the mass. Indeed, the instructions often become, in such cases, his principal protection against unwarranted imputation of guilt from others' conduct. Here also it is of special importance that plain error be not too readily taken to be harmless."

We submit that it is to be regretted that the learned Justice in the instant case has departed from the salutary, just and humane rules pronounced by him in his earlier decision.

THIS HONORABLE COURT HAS FAILED TO PASS UPON QUESTIONS OF VAST IMPORTANCE RAISED BY PETITIONER.

These questions are stated at the commencement of this petition, and they deserve to be argued at length, but the rules which limit the time for a petition for a rehearing to 20 days are as strict as the fell sergeant in *Hamlet*, and at the date of this writing we have barely time for the printing of this petition and its transmission across the continent for filing.

We submit that the questions as to the sufficiency of the indictment, as to the constitutionality of the regulations therein mentioned, the *ex post facto* character of maximum price regulation 445, and the further question as to whether there was anything illegal in the charging of a bonus for the procuring of the liquor, are of sufficient importance, not only to petitioner but to others in similar

situations, to justify more than the cavalier treatment accorded them in the opinion of this Court.

WHEREFORE, your petitioner prays that a rehearing of this cause be granted and that upon such rehearing the judgment of the Circuit Court of Appeals should be reversed.

DATED: January 9, 1948.

SAMUEL S. WEISS,

Petitioner in propria persona.

In the Supreme Court of the United States

OCTOBER TERM, 1947

No. 57

ALBERT FEIGENBAUM,

Petitioner,

VS.

UNITED STATES OF AMERICA,

Respondent.

Petition for a Rehearing

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In the Supreme Court of the United States

OCTOBER TERM, 1947

No. 57

ALBERT FEIGENBAUM,

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vs.

UNITED STATES OF AMERICA,

Respondent.

Petition for a Rehearing

To the Hon. Fred M. Vinson, Chief Justice of the United States, and to the Hon. Associate Justices of the Supreme Court of the United States:

Comes now Albert Feigenbaum, petitioner above named and respectfully requests that the court grant a rehearing of the above cause after decision rendered on December 22, 1947.

In support of this petition for re-hearing, petitioner advances the following grounds:

1. That under the rule announced in *Kotteakas v. United States*, 328 U.S. 750, the guilt or innocence of the petitioner Feigenbaum is a personal matter and must be determined separately from the same question as applied to his co-defendant. This court has failed to apply such rule and has considered Feigenbaum's guilt or innocence together with that of his co-defendants, thus applying evidence to Feigenbaum which was incompetent and inadmissible as to him;

2. That the decision of this court draws inferences from the evidence adverse to Feigenbaum where such evidence is susceptible of innocent inferences, contrary to the decisions which hold that a conviction can only be upheld where the facts are inconsistent with any reasonable theory or hypothesis of innocence;

3. That the decision of this court resorts to evidence, heretofore held by this court to be incompetent for such purpose, for the purpose of establishing the conspiracy charged and Feigenbaum's connection therewith;

4. That in holding the evidence sufficient to establish the guilt of Feigenbaum, this court has resorted to evidence which had been excluded as to Feigenbaum in the trial court.

5. That the decision of this court while noting, has failed to pass upon important questions of law raised by Feigenbaum.

**THE ONLY EVIDENCE DIRECTLY RELATING
TO ALBERT FEIGENBAUM**

The only evidence in the case directly connected with petitioner Feigenbaum is that he was the operator of a drug store in San Francisco; that he purchased from the Francisco Distributing Company, 100 cases of liquor for himself, and 100 cases of liquor for Messrs. Taylor & Humes; that Feigenbaum charged Taylor & Humes \$64.00 for the 100 cases of liquor; that the Francisco Distributing Company was paid for the 200 cases of liquor—100 bought for Feigenbaum—100 sold to Taylor & Humes—at \$24.50 a case. Mr. Taylor further testified that on another occasion he bought a case of whisky from Feigenbaum for \$64.00 which was delivered to him at Feigenbaum's store at the time of the transaction (R. 329).

In addition to the foregoing, the only other evidence in the case pertaining to Feigenbaum is that the 100 cases were delivered to Taylor & Humes; that the Francisco received a check at \$24.50 a case for the 200 cases—100 to Feigenbaum, 100 to Taylor & Humes—and that Taylor & Humes received an invoice from Francisco for 100 cases at \$24.50 a case.

There is no other evidence in the case showing that Feigenbaum had any other dealings with Francisco except as above set forth.

There is no evidence establishing how or in what manner Feigenbaum placed the order for the whisky with Francisco, or that Feigenbaum knew Goldsmith, Blumenthal, Weiss or Abel, or had any knowledge of any other sales of the whisky being conducted by any of the last named persons.

This court correctly held that the admissions of Goldsmith and Weiss were not to be considered in determining the guilt of Feigenbaum and the trial court was meticulous in excluding such evidence as to him.

Likewise, the question of an unknown owner of the whisky is not involved in the Feigenbaum case. The only evidence is that Feigenbaum purchased the whisky from the Francisco Company, both for himself and for Taylor and Humes. The only inference that can be drawn in this regard is that the Francisco Company was the owner of the whisky.

Lastly, there is no evidence that Francisco ever received from the Feigenbaum transactions, any sum in excess of \$24.50 per case.

Standing alone the record as above summarized is wholly insufficient to establish Feigenbaum's connection with the general conspiracy charged in the indictment.

It is only by resorting to unwarranted inferences and to evidence incompetent for such purpose, that a structure of general conspiracy can be erected involving Feigenbaum.

THE DECISION OF THIS COURT RESORTS TO EVIDENCE, FOR THE PURPOSE OF ESTABLISHING THE CONSPIRACY CHARGED, WHICH EVIDENCE IS INCOMPETENT FOR SUCH PURPOSE ACCORDING TO THE PRIOR DECISIONS OF THIS COURT.

It has been the invariable rule of evidence and decision in the Federal Courts that *neither the conspiracy charged nor a defendant's connection therewith can be established by the acts and declarations of a co-conspirator done or said out of the defendant's presence.* Phrased differently

the rule is: that the conspiracy and defendant's connection therewith must be established by proof *aliunde* the acts and declarations of a co-conspirator.

In *Glasser v. United States*, 315 U.S. 60, this court states the rule as follows:

"However, such declarations are admissible over the objections of an alleged co-conspirator, who was not present when they were made, only if there is proof *aliunde* that he is connected with the conspiracy. *Minner v. United States* (C.C.A. 10th) 57 F. (2d) 506; and see *Nudd v. Burrows*, 91 U.S. 426, 23 L.ed. 286. Otherwise hearsay would lift itself by its own boot straps to the level of competent evidence."

In *Minner v. United States*, cited in the *Glasser* case, *supra*, it is stated; at page 511:

"The existence of the conspiracy cannot be established against an alleged conspirator by evidence of the acts or declarations of his alleged co-conspirators done or made in his absence."

The rule as stated in the *Glasser* and *Minner* cases, *supra*, has been announced together with many supporting cases in the cases of *Thomas v. United States* (C.C.A.-10), 57 F.(2d) 1039, 1042; *Dolan v. United States* (C.C.A.-9), 123 Fed. 52, 54; *Nibbelink v. United States* (C.C.A.-6), 66 F.(2d) 178; *U. S. v. Renda* (C.C.A.-2), 56 F.(2d) 601.

This court has resorted to seven individual transactions, involving the whisky,¹ to each of which transactions

1. Sale to Nofman Reinberg and Giometti by Abel; sale to Figone by unidentified salesman; sale to Cernusco by unidentified man; sale to Vogel by unidentified man; sale to Duffy by unidentified man; sale to Lombardi by Blumenthal; sale to Fingerhut and Travis by Blumenthal.

Feigenbaum strenuously objected in the trial court, on the authority of the foregoing cases.

In footnote 14 to this court's decision, there is set forth the evidence held sufficient to establish the conspiracy as to Feigenbaum. Summarized, the evidence in such footnote is as follows.

(1) That prior to the arrival of the first carload of whisky in San Francisco, Blumenthal, Abel and other unidentified salesmen made it known to various people that they could obtain whisky for tavernkeepers; (2) that on the 3rd or 4th of December, Blumenthal told tavernkeeper Fingerhut that the whisky would arrive in the latter part of March; (3) that late in December, Fingerhut received a telephone call, which he said was from Blumenthal, asking whether he needed more whisky and, as a result, Fingerhut made an additional purchase on January 3rd or 4th, 1944; (4) that all of the salesmen followed a singularly set pattern in making their respective sales; (5) that tavernkeeper Reinburg on two occasions, at Abel's direction, drove Abel to San Francisco, dropped him at the Sportatorium, Blumenthal's place of business, and picked him up there a half hour later.

All of the foregoing matters, plus the individual sales made to the tavernkeepers, constituted acts and declarations of alleged co-conspirators done and made out of Feigenbaum's presence and of which he had no knowledge. Under the rules of law and evidence announced by this court and followed in the various circuits, such evidence is incompetent to establish the conspiracy or Feigenbaum's connection therewith, insofar as Feigenbaum is concerned.

It will be noted that the foregoing presents a question different from the one with which this court was mainly concerned, to wit: whether there was a set of separate conspiracies or one general conspiracy as charged. From the trial court through the Circuit Court of Appeals and in this Court, petitioner has contended that there was no competent evidence against him to establish any conspiracy, let alone the one charged in the indictment and that the trial court erred in admitting evidence of the independent transactions of the alleged salesmen as evidence against Feigenbaum. Petitioner further contended that the trial court erred in not instructing the jury that they could not consider the acts and declarations of alleged co-conspirators, said or done out of Feigenbaum's presence, as evidence until the conspiracy and Feigenbaum's connection therewith had been established by evidence *aliunde*. These matters, while properly raised, throughout the record, have not been decided by this court which, in fact, has used such incompetent evidence for the purpose of establishing the conspiracy.

THE CULPABILITY OF FEIGENBAUM DEPENDS ON THE CULPABILITY OF GOLDSMITH. THE EVIDENCE ADMITTED AGAINST FEIGENBAUM FAILS TO ESTABLISH GOLDSMITH'S CULPABILITY.

The decision of this court practically concedes that, in the absence of the so-called admissions made by Goldsmith and Weiss to Harkins, there is no evidence to establish that Goldsmith was doing anything unlawful.

This evidence of the admissions of Goldsmith and Weiss was excluded as evidence against Feigenbaum in the trial

court. However, this court in discussing the culpability of Feigenbaum assumes the culpability of Goldsmith, thus using as evidence against Feigenbaum evidence that had been excluded as to him.

Feigenbaum's guilt can only be determined from the evidence admitted against him and as if he were the only one on trial. Delete the admissions of Goldsmith and Weiss and the activities of Goldsmith appear perfectly lawful and proper. If Goldsmith was not the center of the conspiracy from which the individual spokes radiated, then there is no connection between the activities of the other salesmen and Feigenbaum.

We submit that in holding the evidence to be sufficient to establish Feigenbaum's guilt, this court has overlooked the foregoing matter and that a reconsideration thereof will lead to an entirely different conclusion than the one arrived at.

THE COURT, CONTRARY TO PERTINENT DECISIONS ON THE SUBJECT, HAS INDULGED IN UNWARRANTED INFERENCES TO ESTABLISH THE CULPABILITY OF FEIGENBAUM.

It has always been the writer's understanding that no conviction can be upheld where inferences from the evidence are entirely consistent with innocence even though an inference of guilt could be drawn therefrom. The rule in this regard has been oftentimes announced, some of the later decisions being set forth in the footnote.²

An analysis of the decision of this court discloses that practically all of the inculpatory inferences drawn are directly contrary to the foregoing rule.

2. *Ridenour v. United States*, 14 Fed.(2d) 888, 892;
Kennedy v. United States, 44 Fed.(2d) 131;
Ferris v. United States, C.C.A. 9, 40 Fed.(2d) 836, 840.

Again referring to footnote 14 of this court's decision, it is stated that the inference was justified that Blumenthal, Feigenbaum and the other salesmen were aware that their individual sales were part of a larger common enterprise dependent on the arrangement to give the sales the guise of legitimacy.

In our opinion, the evidence in the case does not warrant such an inference. Nevertheless, such evidence is susceptible of an inference consistent with innocence. Feigenbaum made but one sale of the liquor, he having purchased 100 cases for himself and procured 100 cases for Taylor & Humes. The sale to Taylor & Humes can logically be accounted for as a mere independent act on the part of Feigenbaum by which he sought to make a profit for himself.

This court further states that Feigenbaum knew that there was a carload of whisky involved and that it was a reasonable inference that he knew that other salesmen were making sales similar to his. Would it not be a more reasonable inference to draw from the knowledge of a carload of whisky that other people were making sales, not as Feigenbaum was making one to Taylor & Humes, but as the salesman was making to Feigenbaum? In other words, the only knowledge that can be attributed to Feigenbaum is that he knew Francisco was making sales of whisky to Feigenbaum and to others. That others were in effect reselling the whisky, as Feigenbaum did to Taylor & Humes, and that Feigenbaum knew thereof is a mere matter of conjecture.

This court states that there are compelling indications that all of the salesmen were kept informed of the status

of the whisky. From this, the court infers that such knowledge was part of a general plan to sell the whisky above the ceiling price. A more logical inference can be drawn from the evidence. Feigenbaum was a purchaser of the whisky besides being a seller. As a purchaser he was interested in knowing when he would receive delivery. The fact that others were so interested can not be imputed as a matter of knowledge to Feigenbaum.

This court further states that as all the salesmen had told their prospective customers that he would receive Francisco's invoice for the whisky, that this warranted the inference of a general unlawful scheme. The statement made by Feigenbaum to Taylor & Humes in this regard can be accounted for both logically and innocently. As Feigenbaum placed the order with Francisco in the name of Taylor & Humes, the invoice would issue in the latter names. There is no evidence to show that Feigenbaum knew that anyone else was making such representation.

The decision states that the essence of the unlawful scheme was to sell the whisky illegally in the guise of lawful sales "to the knowledge of each defendant." This inference can be overthrown by one consistent with innocence. Feigenbaum had no knowledge of the activities of Abel, Blumenthal or the unidentified salesmen. Feigenbaum's scheme, if such it can be called, was merely to sell a portion of 200 cases of whisky, which he was able to procure from Francisco, to Taylor & Humes. This constituted an independent, isolated transaction on the part of Feigenbaum, not connected with any activities of others.

This court infers that the plan was one whereby Francisco had in effect made it known that others could procure

whisky from Francisco and resell at a profit, using Francisco's invoices to transfer title, and either keep the unlawful profit or pay all or part thereof to Francisco. The evidence is susceptible of different interpretations and inferences. As to Feigenbaum, it is susceptible of the inference that he alone was to keep any unlawful profit and that his sale was made solely for the purpose of procuring an unlawful profit without any thought or consideration of what others might do. Inferring that Feigenbaum was to keep all such unlawful profit, the entire illegal scheme, as found by this court, must fall to the ground. If Francisco was receiving only a lawful price for its whisky and not participating in any above ceiling profits, the very hub of the wheel is destroyed. If Francisco's only intent was to procure a profit of \$2.00 per case with no concern as to what others might do with the whisky, then there is no culpability on the part of Francisco and no general scheme as found by this court.

Merely to supply the means used by another for the perpetration of a crime, without intent to further the perpetration of such crime, is not a criminal offense (See *Direct Sales Co. v. United States*, 319 U.S. 703). The mere supplying of such means, absent an agreement in some form that the purchaser thereof will use it for an unlawful purpose, does not constitute a criminal offense (*United States v. Falcone*, 311 U.S. 205, 210). Mere knowledge that another is to commit a crime does not make one a participant therein. Participation and active cooperation are necessary (*Direct Sales Co. v. United States*, *supra*; *U. S. v. Falcone*, *supra*; *Eagan v. United States*, 137 Fed.(2d) 369).

Because others used the whisky for the purpose of procuring an unlawful profit cannot charge Feigenbaum with knowledge of such activities or with participation therein. The inference is fully justified that Feigenbaum did not know what any of the other salesmen were doing and did nothing to aid or assist their activities.

To sum up, every logical inference is consistent with Feigenbaum's innocence and non-participation in the criminal scheme as charged. We believe that the only logical and reasonable inference to be drawn from the evidence is that Feigenbaum's activities were individual and independent; that they had no relation to the activities of Abel or Blumenthal or the unidentified salesmen; that Feigenbaum saw an opportunity of making a personal individual profit and that he did so. Beyond this, the record is silent.

This court states that as each salesman knew the lot to be sold was larger, that he thus knew he was aiding in a larger plan. We submit that this lays down a rule allowing the most dangerous inference to be drawn in cases of conspiracy. Assume that any wholesaler has a large amount of goods to sell and that a purchaser procures a small portion thereof and resells in an illegal manner, would this fact justify the conclusion that such purchaser was conspiring with every other person who became a purchaser of the remaining lot? We doubt that such conclusion can logically be drawn. If the seller of the lot actually knew that subsequent illegal sales were to be made and he made the original sales for the purpose of fostering such second sales, then the wholesaler might be guilty. This, however, is entirely different from stating

that each purchaser and reseller became part of a common plan.

CONCLUSION

It is submitted that the decision of this court has laid down new rules for the determination of the sufficiency of evidence in charges of conspiracy and that such rules run counter to prior decisions of this court. This court has now made competent against an individual defendant, evidence of the acts and declarations of alleged co-conspirators for the purpose of proving the existence of the conspiracy and such defendant's connection therewith. The decision of this court now lays down the rule that where evidence on its face is entirely susceptible of a series of inferences consistent with innocence that, nevertheless, a conviction will be upheld if contrary inferences can be drawn from the record. For the foregoing reasons, we believe that a rehearing of this cause should be granted as to petitioner Feigenbaum.

DATED: San Francisco, California, January 10, 1948.

LEO R. FRIEDMAN,
Attorney for Petitioner.

CERTIFICATE OF COUNSEL

I hereby certify that I am counsel for petitioner in the above entitled cause and that in my judgment the foregoing petition for a rehearing is well founded in point of law as well as in fact and that said petition for a rehearing is not interposed for delay.

Dated, San Francisco,
January 10, 1948.

LEO R. FRIEDMAN,
Counsel for Petitioner.

SUPREME COURT OF THE UNITED STATES

Nos. 54-57 — OCTOBER TERM, 1947.

54 Harry Blumenthal, Petitioner,

v.

The United States of America.

55 Lawrence B. Goldsmith, Petitioner,

v.

The United States of America.

56 Samuel S. Weiss, Petitioner,

v.

The United States of America.

57 Albert Feigenbaum, Petitioner,

v.

The United States of America.

On Writs of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit.

[December 22, 1947.]

MR. JUSTICE RUTLEDGE delivered the opinion of the Court.

The four petitioners and Abel, another defendant, were convicted of conspiring to sell whiskey at prices above the ceiling set by regulations of the Office of Price Administration, in violation of the Emergency Price Control Act. 50 U. S. C. §§ 902 (a), 904 (a) and 925 (b). The charge was made pursuant to the general conspiracy statute, § 37 of the Criminal Code. The convictions were affirmed by the Circuit Court of Appeals, one judge dissenting. 158 F. 2d 883, dissenting opinion at 158 F. 2d 762. Abel has not sought review in this Court. Certiorari was granted as to the other four defendants because we thought important questions were presented concerning the applicability of our recent decision in *Kotteakos v. United States*, 328 U. S. 750.

We did not limit our grant of certiorari to that question, however, and on the record it is inseparably connected with the other issues, which relate to the admis-

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sibility and sufficiency of the evidence. Accordingly we have considered all of petitioners' contentions. The competent proof was clearly sufficient to show that each petitioner had aided in the whiskey's illegal sale and had conspired with others to do so. The only phase of the case meriting further attention is whether, because of a difference in the state of the proof affecting two groups of defendants, the proof, in variance from the indictment, shows that there was more than one conspiracy.

I.

The indictment charges a single conspiracy in a single count. Ten overt acts are specified. The Government alleged and sought to establish that all of the defendants and other unidentified persons conspired together to dispose of two carloads, each consisting of about 2,000 cases, of Old Mr. Boston Rocking Chair Whiskey at over the ceiling wholesale prices.

This whiskey was shipped by rail from the distiller or his agent to the Francisco Distributing Company, in San Francisco, in December, 1943. Goldsmith was the individual and sole owner of that business and held a wholesale liquor dealer's basic permit as required by federal law. Weiss, his former partner, was sales manager for the business. Feigenbaum operated the Sunset Drugstore in San Francisco. Blumenthal owned and operated the Sportorium, a sporting goods and pawn shop in the same city. Abel either owned or worked in a jewelry store in Vallejo, California. The evidence does not show that any of these last three was connected with Francisco in any way except that each had part in arranging sales and deliveries of portions of these two shipments to purchasers. These were tavern owners in San Francisco and near-by towns such as Vallejo, Santa Rosa, Livermore, Cottonwood and El Cerrito. Proof of the activities of

Feigenbaum, Blumenthal and Abel was made largely by the testimony of the various tavernkeepers with whom they respectively dealt.

The evidence showed that on arrival of the whiskey in San Francisco legal title was taken in Francisco's name, in which the shipping documents were made out; that it honored sight drafts for both shipments, upon Goldsmith's directions to Francisco's bank to pay them out of Francisco's account; that some of the whiskey was delivered *ex car* directly to tavernkeepers who previously had arranged for purchases in lots varying from 25 to 200 cases; that the remainder was placed in storage with the San Francisco Warehouse Company, pursuant to arrangements made by Weiss, and thereafter was delivered by the warehouse to various purchasers holding invoices issued by Francisco¹ on orders given by Weiss. The *ex car* deliveries also were made pursuant to similar invoices and orders.

It further appeared that the cost of the whiskey to Francisco was \$21.97 a case,² the wholesale ceiling price was \$25.27, and Francisco received, by check of the purchasing tavernkeepers, \$24.50 for each case sold. There was thus left to it a margin above cost of \$2.53 on each case, out of which were to come storage charges, if any, and legitimate net profit.

Thus far no illegal act, transaction, intent or agreement appears. But by the testimony of purchasing tavernkeepers the Government proved that in connection with each sale the purchaser had paid to the selling intermediary, in addition to the \$24.50 per case remitted by check to Francisco, an additional sum in cash amount-

¹ Of the more than 4,000 cases received by Francisco, proof concerning disposition at over-ceiling prices related to less than half, or some 1,500-plus cases.

² Consisting of \$19.24 per case to the distiller, 81¢ for freight, and \$1.92 for state taxes.

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ing roughly to from \$30 to \$40 per case. Thus the actual cost to the retailer was from \$55 to \$65 per case.

In some instances the identity of the person arranging the transaction for the seller and receiving the cash payment was not established or known to the witness testifying to the sale and its details. In others, however, Blumenthal, Feigenbaum or Abel was identified as the salesman or intermediary. It was not brought out with what person or persons Abel, Feigenbaum, Blumenthal or the other salesmen dealt in securing the whiskey from Francisco.³ In two sales, Figone, a tavernkeeper of El Cerrito, testified he arranged for the purchases in Francisco's offices, but could not identify the person with whom he dealt.

In all instances, however, whether involving sales to San Francisco or to out-of-town dealers and whether through identified or unidentified selling intermediaries, the sales followed the general pattern described above. That is, once the understanding had been reached, the purchaser made out his check at the price of \$24.50 per case, to the order of "Francisco Distributing Co.," at the direction of the selling intermediary, to whom the check was delivered; at the same time or later the purchaser also paid in cash to the intermediary the difference between the amount of the check and the agreed over-ceiling purchase price; then or later the purchaser received

³ The witnesses identifying Feigenbaum testified they sought him out at the Sunset Drugstore in San Francisco and made the arrangements with him for their purchases there. Similar testimony was given by those identifying Blumenthal with the arrangements taking place in the Sportorium.

In some instances the out-of-town purchasing witnesses testified that they went to San Francisco in search of whiskey to buy and by one means or another, usually through inquiry of persons frequenting bars where the witnesses stopped, were directed to the selling agent. In other instances the intermediary sought out the tavernkeeper as a prospective purchaser at his place of business.

invoices in the name of Francisco for the number of cases of Old Mr. Boston Rocking Chair Whiskey bought, showing only the legal price of \$24.50 per case; and thereafter the purchaser received delivery of the whiskey from the warehouse company, by freight in the case of out-of-town buyers. Weiss gave the warehouse company instructions for shipments or local deliveries. Francisco collected the checks by endorsing and sending them through its bank for collection. Slight variations in detail of the pattern appear in some instances but they are insignificant for our purposes.

The foregoing is substantially the evidence used, not only in part to show the conspiracy, but also to connect Blumenthal, Feigenbaum and Abel with it. In addition to the evidence already related as it affects Goldsmith and Weiss, the court received as to them alone the testimony of Harkins, a special investigator for the Alcohol Tax Unit of the Treasury Department. He related conversations had with Goldsmith and Weiss, during which important admissions were made by one or the other or both. Those admissions give rise to the crucial problems in the case.

At the initial conference "early in January," 1944, attended by both Goldsmith and Weiss, the latter "did most of the talking." Questioned concerning who purchased the two carloads and how they were handled, Weiss said "that his firm received \$2.00 a case for clearing it through their books." Goldsmith concurred in this and both stated that they divided the \$2.00, each taking a dollar. "They both stated, agreed, that they did not sell any of the whiskey. It was sold by others, and they received the check generally for the payment for the whiskey in advance of the date that they had to take up the sight draft bills of lading. At that time they did not tell us who actually sold the whiskey."

Later conferences held separately with Goldsmith and Weiss simply confirmed the substance of the first to

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the effect that Francisco was not the actual owner, but that Goldsmith and Weiss were acting for an unidentified person in handling the shipments in Francisco's name. The identity of the owner was not established. But Goldsmith added the admission that he wrote most of the invoices.

Shortly after the trial began the court announced that it would save time and be fairer to all for the evidence to be received initially only as against the particular defendant or defendants to whom it appeared expressly related, reserving to the Government, however, the right to move for its admission as against any or all of the other defendants whenever in the Government's opinion sufficient facts had been introduced to show such defendants to have been connected with the conspiracy charged.

This course was followed. At the close of the Government's case, the court granted its motion to admit all of the evidence as against all of the defendants, except that it declined to allow Harkins' testimony concerning

* At an interview with Goldsmith "early in September," Goldsmith was asked "who actually bought him the whiskey, who owned it." In reply "he said that Blumenthal brought it in, and when asked if he knew of his own knowledge, he said, 'No.' " He again stated that Francisco received \$2 per case, of which he gave Weiss half.

A still further questioning of Goldsmith took place on September 13. Harkins showed Goldsmith several invoices given to purchasers in the name of Francisco. Goldsmith admitted that he wrote most of the invoices and identified his own handwriting, stating however that a few were written by his bookkeeper.

Harkins testified also regarding a conversation with Weiss on May 14, 1944. In this Weiss stated "it was true that he received half of the \$2 commission paid to the Francisco Distributing Company for clearing this whiskey through their books, and he finally refused to answer who actually owned the whiskey. He said 'I don't want to involve myself.' " Weiss also admitted knowing Blumenthal, but "refused to state, to the best of my [the witness'] recollection, positively, whether Mr. Blumenthal was the owner of the whiskey or not."

his conversations with Goldsmith and Weiss to be admitted as against the defendants Blumenthal, Feigenbaum and Abel. That testimony however was allowed to stand against both Goldsmith and Weiss insofar as it related the conversation had in the presence of both, and as to each of them respectively to the extent that the other interviews took place in his presence.

The court overruled numerous objections to these rulings by each defendant. None offered evidence in his own behalf.

Following its rulings on admissibility, the trial court concluded as against various objections that the evidence was sufficient to go to the jury on the issues whether the conspiracy charged had been made out and concerning each defendant's connection with it. Accordingly, it overruled the defendants' motions for directed verdicts and submitted the case to the jury. In the instructions the court expressly stated, in accordance with the previous rulings on admissibility, that Harkins' testimony was to be considered only as against Goldsmith and Weiss, not as against the other three defendants.

II.

In the *Kotteakos* case, *supra*, the Government conceded that, under the charge of a single, all-inclusive conspiracy, the proof showed distinct and separate ones connected only by the fact that one man, Brown, was a participant and key figure in all. But it urged that under the ruling in *Berger v. United States*, 295 U. S. 78, the variance was at the most harmless error, a contention we rejected. Here the situation is the reverse. The Government has conceded, in effect, that prejudice has resulted if more than one conspiracy has been proved.⁵

⁵ The brief states: "The Government does not contend that if the proof showed several conspiracies, as the dissenting judge thought; the variance would not be prejudicial."

But it insists that the evidence establishes a single conspiracy and no more, an issue not presented or determined in the *Kotteakos* case.

The proof, in relation to whether one or more conspiracies were shown as well as relative to whether any was made out, requires somewhat different treatment concerning the two groups of defendants, Weiss and Goldsmith, on the one hand, and Blumenthal, Feigenbaum and Abel, on the other. This is by reason of the court's exclusion of the admissions of Goldsmith and Weiss from consideration as to the other three defendants.

The Government does not maintain that Francisco, or Goldsmith (or therefore Weiss), was the owner of the whiskey. It accepts the view that another or others unidentified, were the real owner or owners and that Francisco (and thus Goldsmith and Weiss) was merely a channel for distributing the liquor and giving that unlawful process a legal facade. Indeed the "innocent appearing actions" of Weiss and Goldsmith in their use of Francisco, the brief asserts, "were the crux of the conspiracy . . . since the color of legitimacy was an essential part of the plan to dispose of the liquor to tavern owners at over-ceiling prices."⁶

The evidence including the admissions was clearly sufficient to establish that the owner devised a plan which contemplated the entire chain of events from the original purchase in Francisco's name to the ultimate black market sales and deliveries. This includes the obvious inference that he made the arrangements for

⁶ The brief also declares that "the gist of the conspiracy . . . was the scheme to sell liquor to tavern owners at over-ceiling prices in an apparently legitimate fashion through the medium of Francisco."

The plan, it is said, "was not merely to sell liquor at over-ceiling prices; it was a plan to sell liquor at over-ceiling prices in an apparently legitimate fashion" and "the core of the scheme was the arrangement by which the whiskey would clear to tavern owners through Francisco, a legitimate wholesaler."

clearance through Francisco's books. Since Goldsmith and Weiss were the owner and sales manager respectively of Francisco and had active parts personally in carrying out those arrangements, there hardly can be any question that they knew the owner, had part in making the arrangements with him and, by virtue of those facts and their parts in facilitating the sales and deliveries to the tavernkeepers, knew also of his intention to resell the whiskey and of his plan for doing so in every material respect except that he intended to sell at over-ceiling prices.

The showing on that crucial question was entirely circumstantial. It was nonetheless substantial. Goldsmith and Weiss knew that there was a margin of only about 77¢ between the legal price ceiling and the \$24.50 per case they received by check in payment for the whiskey.⁷ They knew that the invoices sent by Francisco to each purchaser gave no room for even that slender margin but represented only the owner's cost figure. They knew further that by using Francisco's name, services and facilities the owner was concealing his identity from the purchasers in the sales, making Francisco appear as the owner on the paper records; that sales were being made to numerous and widely scattered tavernkeepers; and that in every sale remittance was made to them uniformly not only by check, usually of the purchaser, but also in the exact amount of \$24.50 per case.

⁷ The \$24.50 price was at the most 53¢ above the actual cost of the whiskey, see note 2, plus the \$2.00 fee paid Francisco for the use of its books. There is no evidence that the unknown owner received any portion of this 53¢ margin. Since the record shows that Francisco was billed by the warehouse company for the storage of the liquor, the inference^a was fully justified that the 53¢ margin was largely dissipated by the storage charges and other overhead costs attributable to the sale of the whiskey and that the remaining sum, if any, was retained by Francisco.

The inference that the unknown owner was giving away the liquor is scarcely conceivable. The most likely inferences to be drawn were two, namely, that the owner was selling for a legal margin of not more than 77¢ or that he was selling at over-ceiling prices. The first inference is hardly tenable, especially in view of the prevailing and widespread shortage and demand, with accompanying black market activity, of which the most meticulous wholesale liquor dealer hardly could have been ignorant. The inference was not only justified, it was almost inescapable, that Goldsmith and Weiss knew of the owner's intent and purpose to sell above the lawful price, as well as most of the detail of his plan for doing so. With that knowledge their active aid toward executing his design made them co-conspirators with him, and he with them, toward accomplishing it.

III.

It remains however to consider whether, without the admissions, Blumenthal, Feigenbaum and Abel have been shown to have conspired together and with Goldsmith and Weiss in the scheme proved against the latter two.

The admissions alone disclosed the unknown owner's existence; that Goldsmith and Weiss were acting for him, not for themselves; received from the transactions, and divided equally, the \$2 per case; and gave the use of Francisco's name to cover up the unknown owner's existence, identity and part in the scheme.

Whether or not the evidence stripped of those facts was sufficient to sustain the charge, a preliminary question arises upon the trial court's disposition of the admissions. They supplied strong confirmatory or supplementing proof to show, not only the connections of Goldsmith and Weiss with the scheme, but also its existence and illegal character. If therefore it were shown, or even were

doubtful, that the admissions had been improperly received as against Blumenthal, Feigenbaum and Abel; reversal would be required as to them.⁸

But the trial court's rulings, both upon admissibility⁹ and in the instructions,¹⁰ leave no room for doubt that the

⁸ Even if the evidence were sufficient with the admissions excluded, they were of such importance that if admitted improperly the jury might have drawn entirely different inferences from the whole evidence including them than from it without them.

⁹ Before sending the case to the jury the court stated in its presence and for its benefit that it had granted the Government's motion to admit all the evidence against all the defendants except: "That the testimony of the last witness, Mr. Harkins, is admitted in evidence as against the defendant Goldsmith as to the conversation had by the witness with the defendant Goldsmith; that his testimony is admitted as to the defendant Weiss with respect to conversations with the defendant Weiss; and as to both defendants, Goldsmith and Weiss, as to all conversations at which both defendants, Goldsmith and Weiss, were present, and exceptions are noted as to this ruling on behalf of all the defendants separately." The court then added, on inquiry, that counsel was right in taking this to mean that the Harkins testimony "does not affect the defendants Blumenthal and the other two or three."

¹⁰ At three distinct places the court made references either generally and abstractly or expressly applicable to the admissions.

In the first, after stating that the testimony of an accomplice or co-conspirator and oral admissions of a defendant must be received with caution, the court said: "In this case . . . proof of the conspiracy charged . . . must be made independent of admissions of any defendant made after the termination of the alleged conspiracy."

At a later point the jury was told: ". . . you must disregard entirely any testimony stricken out by the Court, or any testimony to which an objection has been sustained

Testimony which has been admitted only to apply as to a specified defendant may only be considered by you as to that defendant and none other." (Emphasis added.)

And finally near the end of the instructions, expressly referring to the admissions of Goldsmith and Weiss, the court said: "Where the existence of a criminal conspiracy has been shown, every act or declaration of each member of such conspiracy, done or made thereafter pursuant to the concerted plan and in furtherance of the common object, is considered the act and declaration of all the con-

admissions were adequately excluded, insofar as this could be done in a joint trial, from consideration on the question of their guilt. The rulings told the jury plainly to disregard the admissions entirely, in every phase of the case, in determining that question.¹¹ The direction was a total exclusion, not simply a partial one as the Government's argument seems to imply.¹²

spirators, and is evidence against each of them. On the other hand, after a conspiracy has come to an end, either by the accomplishment of the common design, or by the parties abandoning the same, evidence of acts or declarations thereafter made by any of the conspirators can be considered only as against the person doing such acts or making such statements.

"In that connection, you will recall that I advised you during the trial of the case that the statements made by the defendants Goldsmith and Weiss to the witness Harkins could only be considered by you as against those two named defendants." (Emphasis added.)

¹¹ It is not entirely clear whether the words "In that connection," italicized in the last paragraph of note 10, refer only to the last or to both of the preceding sentences, in the specific context of the two paragraphs last quoted. But when those statements are taken in conjunction with the earlier ones and with the court's rulings on admissibility made in the jury's presence, we think the total effect of the instructions was to tell the jury plainly to disregard the admissions entirely in considering the guilt of Blumenthal, Feigenbaum and Abel.

This view, though apparently differing from the Government's, see note 12, is reinforced by the further instruction, immediately following the one last quoted in note 10, to the effect that admissions of a conspirator not made in execution of the common design are not evidence against any of the parties other than the one making them. The admissions here fell clearly in that category, some of them because made after termination of the conspiracy, others because they had no effect to forward its object. None were made in furtherance of the conspiracy's object. Cf. *Fiswick v. United States*, 329 U. S. 211.

¹² Although we are not sure the argument goes so far, it seems to urge, see note 6 and text, that the admissions, as well as the other evidence expressly affecting only one or some of the defendants, were

The court might have been more emphatic. But we cannot say its unambiguous direction was inadequate. Nor can we assume that the jury misunderstood or disobeyed it.

With the admissions thus entirely excluded, we think nevertheless that the remaining evidence was sufficient to show, in accordance with the charge, that the five defendants joined in a single conspiracy to sell the whiskey at over-ceiling prices in the guise of legal sales. We set forth in the margin the remaining evidence, in part, which justifies this conclusion both as to Goldsmith and Weiss¹³ and as to the other three defendants.¹⁴

admissible and were received, not merely as against Weiss and Goldsmith on the whole case but also in part as against the other three; that is, to show even as to them the existence and illegal character of the scheme, though not to establish their connections with it. We do not read the record as showing this was the effect of the trial court's ruling.

¹³ The evidence as to the unknown owner no longer being in the picture, the inference is almost irresistible that Francisco was the owner. On arrival of the whiskey, title was taken in Francisco's name, in which the shipping documents were made out; sight drafts for the two carloads were paid, at Goldsmith's direction, from Francisco's bank account; and the whiskey was stored and delivered by the warehouse company in accordance with Weiss' directions.

At a time when wholesale liquor distributors were hard put to supply even long-established customers, Francisco sold its liquor, through the medium of salesmen who had no previous connection with the firm and were not regularly engaged in the business of selling liquor, to various tavern owners who had not previously had dealings with Francisco. Moreover, the sales were billed at a price 77¢ per case below the OPA ceiling, despite the fact that tavern owners and other retail distributors considered themselves fortunate to secure whiskey at the full ceiling price. Also of interest are tavern owner Figone's over-ceiling purchases, which followed the pattern of the other sales, except in the important respect that they were made at the Francisco office, but with a person Figone could not identify. See text *supra* following note 3.

We are not prepared to say that the jury was not justified in infer-

Footnotes 13 and 14.—Continued.

ring from this evidence that Goldsmith and Weiss, the guiding hands of Francisco, were willing to make the sales only because of an illegal agreement with the salesmen to receive over-ceiling prices.

The case would stand little better for Goldsmith and Weiss upon an inference that they sold to some other person, who in turn resold to the tavernkeepers through the salesmen. For then the 77¢ legal margin would remain, now for the intervening purchaser, together with the use of Francisco's books and records to conceal his existence and part in the transactions and the allowable inferences from those facts.

¹⁴ Acting almost simultaneously in early December before the first carload arrived in San Francisco, Blumenthal and Feigenbaum, as well as Abel and other unidentified salesmen, made it known that they could obtain whiskey for tavernkeepers. There are compelling indications that these salesmen were kept informed of the status of the whiskey. Thus, on the 8th or 9th of December, Feigenbaum told one purchaser that the whiskey would arrive in San Francisco in "about a week or ten days," that it would come in by railroad, and that there would be "a carload of it." The first of the two carloads of liquor actually arrived on December 17. Similarly, on the 3d or 4th of December, Blumenthal told tavernkeeper Fingerhut that the whiskey would arrive in the latter part of the month. The whiskey did so arrive and the purchaser received delivery. Then, late in December, Fingerhut received a telephone call, which he said was from Blumenthal, asking whether he needed more whiskey. As a result, Fingerhut made an additional purchase on January 3 or 4, 1944. The second carload was received by the warehouse company on or about January 3d.

In addition to being well informed as to the progress of the whiskey in its journey westward, the salesmen followed a singularly set pattern in making their respective sales. All knew and so told the prospective customer that he would receive Francisco's invoice for the whiskey at the same below-ceiling price, which invoice was of great importance because it enabled the tavernkeepers to comply with the record-keeping requirements imposed by the California law. See note 15. All made arrangements for the payment of the identical price of \$24.50 per case to Francisco by check. All received the checks, which were delivered to Francisco and collected by it.

Of some significance, in connection with the other evidence, is the

The main difference comes with the elimination of the unknown owner from view, and Francisco's consequent appearance as both actual and legal owner. This changes the detail of the facade, but does not remove either the facade itself or the essence of the unlawful scheme. That still was to sell the whiskey illegally in the guise of legal sales,¹⁵ to the knowledge of each defendant.¹⁶ The gist

testimony of tavernkeeper Reinburg that on two occasions, at Abel's direction, he drove Abel to San Francisco, dropped him at the Sportorium, Blumenthal's place of business, and picked him up there about a half hour later.

The inference was justified that Blumenthal, Feigenbaum and the other salesmen were aware that their individual sales were part of a larger common enterprise, dependent on the carefully evolved arrangements to give the sales the guise of legitimacy, to dispose of a larger store of liquor. Where a salesman knew, as did Feigenbaum, that at least a carload of whiskey was involved, it was an entirely reasonable inference that he knew that other salesmen, paralleling his efforts, were making sales similar to his. On the basis of the evidence, the jury was well warranted in deciding that the facts dovetailed too neatly to be the result of mere chance.

¹⁵ The evidence showed that some of the purchasers were unwilling to buy liquor without receiving a document to show purchase from a lawfully authorized source as required by state law. With Francisco appearing as actual owner the scheme took on the aspect of one to sell its own whiskey illegally in the guise of lawful sales.

¹⁶ Each salesman knew that he was receiving \$30 to \$40 above the ceiling; that Francisco was supplying the whiskey; that the elaborate arrangements were made not merely for his sales, but also for others, see note 14; and that he had to have the cash, as well as the check, before delivery from Francisco was completed.

The basis for imputing such knowledge to Goldsmith and Weiss becomes not so compelling as with the admissions included, but nevertheless remains adequate. However the case is viewed, apart from the admissions, they knew the margin of legal profit left, whether for themselves or for others, after deducting the \$24.50 per case, was only 77¢. If they actually owned and sold the whiskey, why sell below the ceiling in the face of the shortage and demand, when selling

of the conspiracy lay not in who actually owned the whiskey, but in the agreement to sell it in this unlawful fashion, regardless of who might own it.

With the case thus posited, it is true the salesmen did not know of the unknown owner's existence or part in the plan. And in a hypertechnical aspect the case as a whole might be regarded as showing in one phase an agreement among Goldsmith, Weiss and the unknown owner, X, and in the other an agreement among the five defendants to which X was not a party. Thus in the most meticulous sense it might be regarded as disclosing two agreements, with Goldsmith and Weiss as figures common to both.

Indeed that may be what took place chronologically, for conspiracies involving such elaborate arrangements generally are not born full grown. Rather they mature by successive stages which are necessary to bring in the essential parties. And not all of those joining in the earlier ones make known their participation to others later coming in.

The law does not demand proof of so much. For it is most often true, especially in broad schemes calling for the aid of many persons, that after discovery of enough to show clearly the essence of the scheme and the identity of a number participating, the identity and the fact of participation of others remain undiscovered and undiscoverable. Secrecy and concealment are essential features of successful conspiracy. The more completely they are achieved, the more successful the crime. Hence the law rightly gives room for allowing the conviction

costs including the salesmen's compensation still were to be paid? If they did not own or sell at the \$24.50 figure, then why the checks and false invoices in that amount? The inference is justified that either they or someone else to their knowledge was receiving more than the lawful price.

of those discovered upon showing sufficiently the essential nature of the plan and their connections with it, without requiring evidence of knowledge of all its details or of the participation of others.¹⁷ Otherwise the difficulties, not only of discovery, but of certainty in proof and of correlating proof with pleading would become insuperable, and conspirators would go free by their very ingenuity.

Here, apart from the weight which the proof of the unknown owner's existence and participation added to the convictions of Weiss and Goldsmith, it added no essential feature to the charge against the five defendants. The whiskey was the same. The agreements related alike to its disposition. They comprehended illegal sales in the guise of legal ones. Who owned the whiskey was irrelevant to the basic plan and its essential illegality. It was a matter of indifferent detail to the salesmen, as by the same token was the fact that Goldsmith and Weiss were receiving and splitting only the \$2 per case. It mattered nothing to the others whether those two received only that amount or the larger illegal sums.

We think that in the special circumstances of this case the two agreements were merely steps in the formation of the larger and ultimate more general conspiracy. In that view it would be a perversion of justice to regard the salesmen's ignorance of the unknown owner's participation as furnishing adequate ground for reversal of their convictions. Nor does anything in the *Kotteakos* decision require this. The scheme was in fact the same scheme; the salesmen knew or must have known that others unknown to them were sharing in so large a proj-

¹⁷ *Marino v. United States*, 91 F. 2d 691; *Lefco v. United States*, 74 F. 2d 66; *Jezewski v. United States*, 13 F. 2d 599; *Allen v. United States*, 4 F. 2d 688.

ect; and it hardly can be sufficient to relieve them that they did not know, when they joined the scheme, who those people were or exactly the parts they were playing in carrying out the common design and object of all. By their separate agreements, if such they were, they became parties to the larger common plan, joined together by their knowledge of its essential features and broad scope, though not of its exact limits, and by their common single goal.

The case therefore is very different from the facts admitted to exist in the *Kotteakos* case. Apart from the much larger number of agreements there involved, no two of those agreements were tied together as stages in the formation of a larger all-inclusive combination, all directed to achieving a single unlawful end or result. On the contrary each separate agreement had its own distinct, illegal end. Each loan was an end in itself, separate from all others, although all were alike in having similar illegal objects. Except for Brown, the common figure, no conspirator was interested in whether any loan except his own went through. And none aided in any way, by agreement or otherwise, in procuring another's loan. The conspiracies therefore were distinct and disconnected, not parts of a larger general scheme, both in the phase of agreement with Brown and also in the absence of any aid given to others as well as in specific object and result. There was no drawing of all together in a single, over-all, comprehensive plan.

Here the contrary is true. All knew of and joined in the overriding scheme. All intended to aid the owner, whether Francisco or another, to sell the whiskey unlawfully, though the two groups of defendants differed on the proof in knowledge and belief concerning the owner's identity. All by reason of their knowledge of the plan's general scope, if not its exact limits, sought a common end,

to aid in disposing of the whiskey. True, each salesman aided in selling only his part. But he knew the lot to be sold was larger and thus that he was aiding in a larger plan. He thus became a party to it and not merely to the integrating agreement with Weiss and Goldsmith.

We think therefore that in every practical sense the unique facts of this case reveal a single conspiracy of which the several agreements were essential and integral steps, and accordingly that the judgments should be affirmed.

The grave danger in this case, if any, arose not from the trial court's rulings upon admissibility or from its instructions to the jury. As we have said, these were as adequate as might reasonably be required in a joint trial. The danger rested rather in the risk that the jury, in disregard of the court's direction, would transfer, consciously or unconsciously, the effect of the excluded admissions from the case as made against Goldsmith and Weiss across the barrier of the exclusion to the other three defendants.

That danger was real. It is one likely to arise in any conspiracy trial and more likely to occur as the number of persons charged together increases. Perhaps even at best the safeguards provided by clear rulings on admissibility, limitations of the bearing of evidence as against particular individuals, and adequate instructions, are insufficient to ward off the danger entirely. It is therefore extremely important that those safeguards be made as impregnable as possible. Here, however, the case as presented involved none of the risks common to mass trials. And, in view of the trial court's caution, the risk of transference of guilt over the border of admissibility was reduced to the minimum. So great was the court's concern that it expressly told the jury, in addition to the instructions set forth above, "... the guilt or innocence of each

defendant must be determined by the jury separately. Each defendant has the same right to that kind of consideration on your part as if he were being tried alone."

We have considered petitioners' remaining contentions and find them without merit.¹⁸

The judgment is

Affirmed.

MR. JUSTICE DOUGLAS concurs in the result.

¹⁸ These include the argument that petitioners were prosecuted under the wrong statute. Section 4 (a) of the Emergency Price Control Act makes it unlawful, as a misdemeanor, § 205 (b), for any person to sell or deliver any commodity in violation of price regulations, "or to offer, solicit, attempt, or agree to do any of the foregoing." (Emphasis added.) Petitioners regard the prohibitory words "or agree," etc., as repeal by implication of the general conspiracy statute, § 37 of the Criminal Code, insofar as otherwise it might apply to the acts forbidden by § 4 (a). There was no "implied repeal." Conviction under the general conspiracy statute requires more than mere agreement, namely, the commission of an overt act. See also *Taub v. Bowles*, 149 F. 2d 817; H. Rep. No. 827, 79th Cong., 1st Sess., 7-8.